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SOME LESSONS FROM

OUR LEGAL HISTORY

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SOME LESSONS FROM OUR LEGAL HISTORY

BY

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FELLOW OF ALL SOULS COLLEGE AND VINERIAN PROFESSOR OF THE LAWS OF ENGLAND IN THE UNIVERSITY OF OXFORD; BENCHER OF LINCOLN'S INN

JULIUS ROSENTHAL FOUNDATION LECTURER
FOR 1927 IN NORTHWESTERN UNIVERSITY

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THE JULIUS ROSENTHAL FOUNDATION FOR GENERAL LAW

JULIUS ROSENTHAL, an eminent and beloved member of the Chicago Bar, was born in Germany on September 17, 1828. He pursued his studies at the Universities of Heidelberg and Freiburg, came to Chicago in July, 1854, and was admitted to the bar in 1860. He was especially prominent as a practitioner in the law of wills and in probate and real estate law. As librarian of the Chicago Law Institute from 1867 to 1877 and again from 1888 to 1903, and its president from 1878 to 1880, he was chiefly responsible for its development. He was a member of the first Board of State Law Examiners of Illinois, and its secretary (1897-1899). He died May 14, 1905.

JULIUS ROSENTHAL was a lawyer of great learning and rare scholarly attainments. He labored long and earnestly to establish the best standards of legal scholarship. His interest in the welfare of the Law School of Northwestern University was constantly manifested, and of this his numerous gifts of books were tokens.

To honor his memory the University in 1919 established THE JULIUS ROSENTHAL FOUNDATION FOR GENERAL LAW. The income derived from the Foundation is, among other uses, applicable to the cultivation of legal literature, and particularly to the publication of meritorious essays, monographs, and books of a scientific or practical nature concerning the law, which otherwise might not readily find a publisher; to the aid or encouragement of research in the field of legal literature and the preparation for publication of the results of such research; and to the delivery and publication of lectures on subjects concerning the law.

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INTRODUCTION

When Dr. Holdsworth, in March, 1927, took leave of absence from All Souls College and the Vinerian chair of Law in the University of Oxford, and came to the United States (his visit to this country) as the first lecturer on the Julius Rosenthal Foundation of Northwestern University, he found the heartiest and widest welcome that ever was accorded by the Universities and the Bar of the United States to a representative of the legal profession from Great Britain.

His visit began at Northwestern University, where he delivered the first three lectures here printed. The visit was extended by invitation to the Universities of Yale, Harvard, Columbia, Pennsylvania, Iowa, Wisconsin, Southern California, Stanford, California, Washington, and Chicago. He was the guest in turn of the Bar Associations of Chicago, New York, Baltimore, Los Angeles, San Francisco, Portland, Seattle, Vancouver, Iowa, and Springfield (Illinois); and he was a speaker at the annual banquet of the American Law Institute in Washington.

Finally, at the Dedication Ceremonies, on June 16, of the McKinlock Campus of Northwestern University, he delivered the Dedication Address for the Buildings of the School of Law—Levy Mayer Hall and Elbert H. Gary Law Library Building—the fourth and last of the lectures here printed.

Preceded by an international reputation founded on his "History of English Law," he brought with him a sympathetic spirit, and a genial adaptability to American manners and customs. The many American Rhodes scholars who had studied under him at Oxford, now domiciled throughout the United States, greeted him with pride as an esteemed master revisiting his matured disciples. The Universities welcomed him as the premier representative today of English legal scholarship. The Bar, remembering that he occupied the chair made famous by its first incumbent, Sir William Blackstone, a century and a half ago, received him with that sentiment of fraternal ownership which in every American lawyer is inspired by the name of Blackstone.

At the convocation of Northwestern University conferring honorary degrees, on June 17, 1927, he was thus introduced:

> "Vinerian Professor of the Laws of England in Oxford University and Julius Rosenthal Foundation Lecturer for 1927 in Northwestern University; author of a comprehensive master-work, which for the first time illumines the entire path of English legal history down to modern days, and supplies a potent inspiration to the fraternity of the legal profession in both hemispheres."

This volume is the permanent memorial of his American visit.

John H. Wigmore,
Dean of the Faculty of Law,
Northwestern University.

October, 1927.

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I. THE IMPORTANCE OF LEGAL HISTORY

SOME LESSONS FROM OUR LEGAL HISTORY

I. THE IMPORTANCE OF OUR LEGAL HISTORY

I HAVE been engaged on the study of our legal history for over thirty years, and I have been writing legal history for more than twenty-five years. Therefore, when I set out to give you some reasons why more attention should be paid to the study of our legal history, I am only preaching what I have long practised. In fact the experience of the many years, during which I have been teaching law and writing legal history, has convinced me of the importance of the study of our legal history not only to lawyers, whether they are practitioners or teachers, but also to historians of each and every side of our national life. It is of importance to lawyers, both because it helps them to understand, and so either to appreciate or to criticize intelligently, the complicated mechanism of the law; and because it helps them to come to a right conclusion upon doubtful points of law, which depend for their solution upon the correct appreciation of old rules of law and old statutes. It is of equal importance to general historians because

law touches all those human activities, which a state or a community have at different periods found it necessary to regulate. Constitutional, social, economic, and political historians are all sooner or later brought up against the law; and the manner in which the law has, at different periods, dealt with the activities which are the subject of their studies, cannot be fully understood without some knowledge of its history. And, if this is true, I think that we may go even further, and maintain that the study of our legal history is important to all citizens. It is important to all citizens, first because it teaches them something of the mechanism of government, which they have the right and the duty to maintain in working order; and secondly because some knowledge of the outline of the age-long struggle of the law against manifold forms of wrongdoing, some knowledge of the manner in which law has, as the result of that struggle, made civilized life possible, helps to create that respect for the law and that law-abiding instinct, which are the conditions precedent for the maintenance and improvement of the standards of a nation's life.

For these reasons I maintain that the study of our legal history, that is of Anglo-American legal history, is of paramount importance. I am not, in these lectures, concerned with the study of legal history in general. I do not intend to give you any of those broad surveys of different philosophies of law, such as Dean Pound has given you in his inspiring book on *Interpretations of Legal History*. I am concerned with a

topic which is smaller in ambit, but, I am inclined to think, larger in practical importance. The law which originated in England, and the language which originated in England, are the two great proofs that England and America are still bound together by ties of blood relationship. Of these two ties the tie of law is quite as important as the tie of language; for it has given us a large number of political and legal ideas, and, to the extent to which law and morals coincide, a large number of ethical ideas, which are fundamentally similar. They are fundamentally similar because, in spite of all the differences in detail, which separate development has entailed, they have had a common origin. It is only by approaching their study from the point of view of their common origin, that is from the historical point of view, that we can understand the shape which they have taken, their achievement in the past, their influence upon modern life, and their suitability to our modern needs. It is history alone, and more especially legal history, which enables us, not only to describe and define these political and legal institutions and ideas, but also to discover the reason why they have worked and are working, and the effects which they have produced and are producing. And here the divergencies in the legal and political institutions and ideas of England and America, caused by differences in their legal and political history, can be made to afford lessons to both countries. The fact that small divergencies have sometimes had large effects, will often set us to work to apply a closer historical analysis to an institu-

tion or an idea, and so to arrive at a clearer understanding of its real essence.

These considerations will help us to give an answer to those who say 'What is the use of legal history?' 'Is it not enough to know the law of today?' 'Why bother about obsolete law, obsolete institutions, obsolete technicalities?' But in giving an answer to these objectors we must be careful to define, first, what we mean by legal history, and, secondly, how we intend to use it. First, it is not always easy to draw the line between mere antiquarianism and effective legal history. For instance, to discourse at length, as Reeves did, of the complicated mediaeval procedure in actions real and personal, is sheer antiquarianism. Effective legal history, when it deals with procedure, should only give us so much of the history of procedure as will enable us to understand the manner in which our modern rules have been evolved. "We must beware," as Mr. Justice O. W. Holmes has said,[1] "of the pitfall of antiquarianism, and must remember that for our purpose our only interest in the past is for the light it throws upon the present." We must avoid what Selden called "the sterile part of antiquity." The legal historian must have his eye on the end of the story, and be able to pick out the beginnings of those principles and rules and institutions which have survived and are operative today. That is why Maitland was so effective a legal historian, and by far the best editor of Year Books who has ever existed. He was a master both of mediaeval

[1] *Collected Legal Papers* 194-5.

and modern law; and therefore he was able to detect in stray dicta the germs of ideas which had a history. We must have legal history of this kind if we are to understand the law of our own day, for many obsolete rules, institutions, and technicalities have gone to the making of it; and, to use Maitland's striking expression, "rule us from their graves." Secondly, we must not, as Dean Pound has said, make legal history a "juristic God." We must not suppose that, because we find a rule or an idea in a Year Book or in an old writer, we must at once accept the law as so stated without comment and without criticism. Legal history used in this way becomes merely another name for an unintelligent conservatism; and, because it was so used in the eighteenth century, it produced, in the era of the French Revolution, opposite views which are equally erroneous. Tradition, it was said, should be disregarded; and each generation should make its own laws to suit its own tastes and ideas.[2] But it is obvious that such a disregard of the teachings of history is as foolish as a blind and literal following of all the solutions of

[2] "Writing to Madison in 1789, Jefferson had said that the earth belonged 'in usufruct to the living,' that in consequence every constitution and every law naturally expired at the end of nineteen years, and that if enforced longer, it was imposed by force and not by right. Proceeding on the political doctrine of the consent of the governed, he argued that every new generation should renew that consent which gives to law its binding force, and that unless this consent was so renewed as to each rule of law, the rule ceased to be obligatory," Pound, *Interpretations of Legal History* 13.

particular problems which may be extracted from those teachings. "It is with infinite caution," said Burke,[3] "that any man ought to adventure upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes"; and this also was the opinion of Sir Mathew Hale.[4] Burke and Hale's opinions indicate the proper uses of legal history—its use in explaining those older, those traditional parts, which all long established legal systems must contain; its use in pointing out and advocating, as Maitland pointed out and advocated in his paper on *The Law of Real Property*,[5] the reforms which are most urgently needed.

Legal history, thus defined and thus used, is necessary to the understanding and intelligent working of all

[3] *Reflections on the French Revolution* (7th Ed.) 90.

[4] "It is a reason for me to preferre a Law by wch a Kingdome hath been happily governed four or five hundrd yeares then to adventure the happiness and Peace of a Kingdome upon Some new Theory of my owne tho' I am better acquainted wth the reasonableness of my owne theory then wth that Law. Againe I have reason to assure myselfe that Long Experience makes more discoveries touching conveniencies or Inconveniences of Laws then is possible for the wisest Councill of Men att first to forsee. And that those amendments and Supplements that through the various Experiences of wise and knowing men have been applyed to any Law must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant witts not ayded by Such a Series and tract of Experience." Hale's "Reflections on Hobbes's Dialogue of the Law," printed Holdsworth, *Hist. Eng. Law* v. 504.

[5] *Collected Papers* i. 162.

long established legal systems, for this obvious reason: all long established legal systems must possess a background of old institutions, and of old technical principles and rules, sufficiently stable to give security to the ordering of society, and yet sufficiently elastic to allow the changes needed by altered social needs, and an altered public opinion. It is because the legal systems of Rome and England solved this difficult problem of combining stability with elasticity that they have become two of the greatest legal systems that the world has ever seen.

I propose in these lectures to indicate the manner in which different aspects of this problem have been solved by our common law. In this lecture I shall show that the study of our legal history is needed to understand the manner in which the chief sources of our law came into being, the manner in which they were gradually evolved to meet new needs, and the conditions of their efficient working. In my second lecture I shall show that it is needed to understand the evolution and working of important parts of our legal machinery. In my third lecture I shall show that it is needed to understand the attitude of the common law to certain problems on the border line between politics and law. I hope that this treatment of the subject will prove the necessity for the study of our legal history by all students who would understand the true meaning of the salient features of our common law, by all students of those various branches of history—economic, social, and constitutional

—which impinge upon law, by all students of the political problems of the present day.

Both in Roman and English law the sources of law fell into two well marked divisions—law which is made by the lawyers, and law which is made by the Legislature. At Rome the two great divisions of the *Corpus Juris Civilis* are the Digest which contains the lawyer-made law, and the Code which contains the enactments of the Legislature. Similarly in England, the two great divisions of the sources of the law are, on the one hand, the plea rolls, the reports and the books of authority, and, on the other, the statutes. The great contrast between Roman and English law is the form which the law made by the lawyers has taken in these two systems. As Sir Frederick Pollock has said,[6] "common law learning is forensic in its origin, civilian learning is scholastic."

The form which both the enacted law and the lawyer-made law have taken in England has been determined by three closely related phenomena in the English legal history of the twelfth, thirteenth, and fourteenth centuries. First, the early centralization of royal justice, and its early victory over competing jurisdictions—communal, franchise, and feudal. Secondly, the consequent growth, in the thirteenth century, of a legal profession, from the ranks of which the bench came to be recruited; and, in the fourteenth century, the organ-

[6] Continental Law in the Nineteenth Century (*Continental Legal History Series*) xli.

ization and education of that profession in the Inns of Court. Thirdly, the cessation, at the end of the thirteenth century, of that influence of Roman law which, in the twelfth and during the greater part of the thirteenth century, had had so great an influence on the growth of a common law; and the consequent development of English law, during the fourteenth and later centuries, on native lines. These three phenomena have had a profound influence, both on the form which the sources of English law originally took, and on the manner in which, in later ages, they have been adapted to meet changing legal and political conditions. Let us examine the manner in which these influences have affected, first the sources of the law made by the lawyers, and secondly the sources of the law made by the Legislature.

THE LAW MADE BY THE LAWYERS

The law made by the lawyers falls into the two main heads of case law, and law contained in books of authority.

(1) *Case Law.*

The Year Books and the Reports are the main sources of our case law. It is true that, in the days before the Year Books, Bracton relied upon the Plea Rolls.[7] It is true that a reference to the Plea Rolls is always per-

[7] For the Plea Rolls see Holdsworth, *H.E.L.* (3rd Ed.) ii. 185-6; for Bracton's use of the Plea Rolls see *ibid.* 235-6, 243-4.

missible, and may sometimes be necessary.[8] But no lawyer has ever had constant and ready access to the Plea Rolls; and, even if this difficulty could have been overcome, the information which the Rolls contain did not and does not satisfy the needs of lawyers.[9] And so the series of anonymous Year Books—of reports made by lawyers for lawyers—arose.[10] In the sixteenth century they gave place to Reports made by named reporters.[11] The style of these reports is, owing to changes in legal procedure, different from the style of the Year Books. The Year Books, in a large number of cases, report, not so much decisions, as discussions on the question what pleas will be best suited to raise the issues on which the case turned.[12] But, with the rise of written pleadings, settled by the advisers of the parties before they got into court,[13] the report assumes its modern shape, and turns upon the decisions of the issues so

[8] "The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records* . . . ; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance," Bl. *Comm.* i. 69.

[9] Holdsworth, *H.E.L.* (3rd Ed.) ii. 538-9, 555; Holdsworth, *Sources and Literature of English Law* 82-3.

[10] For the Year Books see Holdsworth, *H.E.L.* (3rd Ed.) ii. 525-556; Bolland, *Three Lectures on the Year Books;* Winfield, *Sources of English Legal History* 148-183.

[11] Holdsworth, *H.E.L.* v. 274-8, 355-74, vi. 551-74, 616-19; Winfield, *op. cit.* 183-199; Holdsworth, *Sources and Literature of English Law* 89-104.

[12] *Ibid.* 85-7; Holdsworth, *H.E.L.* (3rd Ed.) ii. 352-6.

[13] *Ibid.* iii. 639-53.

raised.[14] This tended to introduce the modern style of reporting; and Bacon, in the advice which he gave to reporters, foreshadows the form which the report will assume.[15] But, from the sixteenth to the latter part of the eighteenth century, the publication of reports depended on the initiative of individual lawyers. There was no regular reporting of the decisions of the courts as they were given, till the institution, by Durnford and East in 1785, of the Term Reports of cases decided in the court of King's Bench. This new practice gave rise to the various series of authorized and unauthorized reports. It was not till 1863 that the legal profession assumed some control over the reporting of cases, by the establishment of the Council of Law Reporting, which publishes the quasi-official series of the Law Reports.[16]

The evolution of case law gradually gave rise to our modern theory as to the binding effect of decided cases.[17] That decided cases had always possessed authority from

[14] *Ibid.* iii. 654-6; v. 371-2.

[15] "Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments: do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable," *De Augmentis* Bk. viii. c. 3. Aph. 74. The translation is Spedding's.

[16] Holdsworth, *Sources and Literature of English Law* 89-104.

[17] On this subject see Pollock, *A First Book of Jurisprudence*, Chap. VI; Gray, *Nature and Sources of Law*, Chaps. IX and X; Winfield, *Sources of English Legal History* 145-8; E. K. Allen, *Law in the Making* 123-46; Holdsworth, *H.E.L.* (3rd Ed.) ii. 541-2, v. 372-3.

the earliest times, is clear from Bracton's Treatise and the earliest Year Books. But, in the Middle Ages and later, the modern theory as to their authority had not emerged. It was not till the style of the law report changed, to meet the changes introduced by the new system of written pleadings, that it could begin to emerge.

The manner in which Coke cites and distinguishes cases in his Reports shows that it was beginning to emerge at the end of the sixteenth century; and Bacon, in the De Augmentis, could say "judicial decisions are the anchors of the laws as the laws are anchors of the state." [18] By the beginning of the eighteenth century the modern theory had been in substance reached. But, as late as the end of the seventeenth century, there were lawyers who denied it. Vaughan C. J. in 1673, after distinguishing between the binding force of obiter dicta and decisions, says, "If a Court give judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law. For any Court may err, else errors in judgment would not be admitted, nor a reversal of them. Therefore if a Judge conceives a judgment given in another Court to be erroneous, he being sworn to judge according to law, that is, in his own conscience, ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wrong'd before." [19] This is really very much closer to

[18] "Judicia enim anchorae legum sunt, ut leges reipublicae," Bk. viii. c. 3. Aph. 73.

[19] Bole *v.* Horton, Vaughan at p. 383.

the ideas prevailing in continental states than to the ideas of the common law of today; and probably, when it was written, it did not quite truly represent the practice of our common law. Hale, though he denies that the decisions of the judges make law, though he affirms that they are "less than a law," admits that "they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever." [20] But it is clear that the distinction between a law, and a statement which is very strong evidence of the law, is somewhat thin. Lord Hardwicke said in 1754,[21] "I think authorities established are so many laws; and receding from them unsettles property; and uncertainty is the unavoidable consequence." This was in substance the opinion of Blackstone. It is true that he admits that a decision which is contrary to reason or to divine law cannot stand.[22] But he clearly states the general rule to be that the judges must "abide by former precedents when the same points come again in litigation." [23] And the reason, he says, is "as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to deter-

[20] *History of the Common Law* (6th Ed.) 90.
[21] Ellis *v.* Smith (1754) 1 *Ves. Jr.* at p. 17.
[22] *Comm.* i. 69-70. [23] *Ibid.* 69.

mine, not according to his own private judgment, but according to the known laws and customs of the land." [24] Moreover, he tries to minimize the force of his admission that a decision contrary to reason or divine law cannot stand, by saying that "even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." [25]

It is true that there was still no very certain rule as to the extent to which courts of coordinate jurisdiction were bound by each other's decisions. In the old days the separate and independent courts of Common Pleas, Exchequer, and King's Bench, like the Proculians and Sabinians in Roman Law, sometimes followed different rules on certain matters;[26] and in our own day the judges of the same divisions of the High Court do not always follow each other's decisions. But I think that we may say that, in the eighteenth century, the modern rule stated by Sir Frederick Pollock [27] was substantially followed. "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of coordinate authority nor on that court

[24] *Comm.* i. 69. [25] *Ibid.* 70.

[26] Thus in the sixteenth century, and till the decision in Slade's Case in 1602 (4 Co. Rep. 92b), the Common Pleas and the King's Bench took different views on the question whether assumpsit could be brought on a debt without an express subsequent promise, Holdsworth, *H.E.L.* (3rd Ed.) iii. 443-4; similarly in the nineteenth century there was a difference of opinion as to the kind of misrepresentation which would support an action for deceit, Smith, *Leading Cases* (10th Ed.) 82-83.

[27] *A First Book of Jurisprudence* (1st Ed.) 299-300.

itself, will be followed in the absence of strong reasons to the contrary. The decisions of a Court of Appeal are binding on all courts of coordinate rank with the court below, and generally, according to English practice, on the Appellate Court itself." The House of Lords decided in 1898, in accordance with the opinions of many eminent lawyers [28] that it was bound by its own decisions.[29]

But it should be noted that when we talk of the binding force of judicial decisions, we do not mean that all the words used by the judge, still less all his reasons, are law. As Sir Frederick Pollock has said, "judicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle recognised or applied as necessary grounds for the decision. Therefore, it has never been possible for the courts to impose dogmatic formulas on the common law." [30] It is probable that the emergence

[28] *Ibid.* 310-17.

[29] London Streets Tramway Co. *v.* London County Council [1898] A. C. 375.

[30] Continental Law in the Nineteenth Century (*Continental Legal History Series*) xliv. This was the opinion of Bacon who said, *De Aug.* Bk. viii c. 3. Aph. 85, "neque enim ex verbis regulae petenda est probatio, ac si esset textus legis: regula enim legem (ut acus nautica polos) indicat non statuit;" of Lord Mansfield, who in R. *v.* Bembridge (1783) 3 Dougl. at p. 332 said, "the law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases"; and of Lord Hardwicke, who said, "neither law nor equity consists merely of casual precedents, but of general rules and principles by the reason of which, the several cases coming before the courts of justice, are to be governed," Gorton *v.* Hancock,

of this theory is due historically to the very gradual way in which our modern theory as to the binding force of judicial decisions was developed. It is clear that it ensures to the common law, in a high degree, the quality of flexibility, and the power to expand.

The common law has thus evolved an wholly original system of developing the law. It is the product of small changes and gradual adaptations made by a learned self-governing profession, responsible only to itself. Founded originally, and dependent all through its history, on professional conventions, it has become something very much more than mere convention—even as the eighteenth century conventions of the governing classes, on which the system of cabinet government is founded, have become an important part of the law of the constitution.

It is on the system of case law, as thus developed, that the common law of England was very largely based in Blackstone's day. Let us recall Burke's emphatic words:[31] "The English Jurisprudence hath not any other sure foundation, nor consequently the lives and property of the subject any sure hold, but in the maxims, rules, and principles, and judicial traditionary line of decisions contained in the notes taken, and from

Harg. MSS. 353 f. 122, cited P. C. Yorke, *Life of Hardwicke* ii. 492. This dictum of Lord Hardwicke's seems preferable to the contrary dictum reported (perhaps erroneously) in Ellis *v.* Smith, (1754) 1 *Ves. Jr.* at p. 17.

[31] Report of April 30, 1794, of a Committee of the House of Commons on the proceedings on the trial of Warren Hastings, *Works* (Bohn's Ed.) vi. 451-2.

time to time published, (mostly under the sanction of the judges), called Reports . . . To put any end to Reports is to put an end to the law of England." It is true that the English law of today is based less on case law, and very much more on statute law, than it was when Blackstone wrote. But it should be noted that many of these statutes simply codify the results arrived at by case law. What then are the reasons why this unique system of case law was able to develop a legal system, which is fit to be compared, and to be compared in many respects favorably, with the system of Roman Law?

The *a priori* reasons are fairly obvious. Case law, developing as it does from precedent to precedent, preserves a continuity in legal development, which is essential to the construction of a system of law.[32] Being based on actual happenings, it keeps the law in touch with reality. There is no room for abstract reasoning on possible events suggested by the ingenuity of academic inquirers.[33] It produces a law which is eminently adaptable to the needs of a changing society. Coke's Reports restated, and adapted to the needs of the seventeenth century, the mediaeval common law; and, in the nineteenth century, a succession of eminent judges adapted to the needs of that century of change,

[32] Burke said, *ibid.* 453, "nothing better could be devised by human wisdom than argued judgments publicly delivered, for preserving unbroken the great traditionary body of the law, and for marking . . . every variation in the application and the construction of particular parts."

[33] See Gray, *Nature and Sources of Law*, §§ 587-595.

the common law of the seventeenth and eighteenth centuries. It has some claims to be an eminently scientific way of constructing a legal system; and, on that ground, it may, as Sir Frederick Pollock has said, "fairly claim kindred with the inductive sciences." [34] But these *a priori* reasons do not tell us why this system of case law has not been adopted in continental countries. Nor do they tell us why, in countries where it has been adopted, it does not always work so well as in England. It is to the reasons for these phenomena that we must look for the essential causes of the success of the English system of case law. These reasons cannot be supplied by any *a priori* considerations. They can be supplied only by legal history; and, as we shall now see, a system of case law will never be so successful as it has been in England, in the absence of the peculiar conditions in which it originated and was developed. These conditions can, I think, be summarized as follows:

In the first place, a system of case law demands, for its satisfactory working, the presence of a centralized judicial system. This has been a marked feature of English law from the thirteenth century onwards; it was noted by the Venetian ambassador at the end of the fifteenth century;[35] and, at the beginning of the nine-

[34] *Essays in Jurisprudence and Ethics* 238; and Dean Pound agrees; he says (*Science of Legal Method* 214) "it is in truth the method of the natural scientist, of the physician and of the engineer, the method of trial hypothesis and confirmation."

[35] *Italian Relation of England* (Camden Soc.) 36.

teenth century, the English judicial system was more completely centralized than any in Europe.[36] This was inconvenient to the suitor. But it made for the success of the system of case law; for it meant that the number of reports was limited, and that only the considered decisions of competent lawyers were reported. If we except the mediaeval reports of the general Eyres, the practice of reporting the decisions of the itinerant justices began late, and was soon discontinued;[37] and, when the system of the new county courts was established in 1846, English lawyers showed their instinctive sense of one of the main conditions for the success of the system of case law, by abstaining from reporting their decisions. No doubt many of them despised the untechnical, some would have said the unlearned, justice which these new county courts dispensed.[38] But, however that may be, it is clear, as Bacon pointed out,[39]

[36] Holdsworth, *H.E.L.* (3rd Ed.) i. 188.

[37] Pollock, *A First Book of Jurisprudence* 322-3; they begin with Peake (1790-94), and end with Foster and Finlason (1858-65), Wallace, the *Reporters* 541-3.

[38] In Hayes's Dialogue (*Crogate's Case: A Dialogue in the Shades*, printed Holdsworth, *H.E.L.* ix. 417) Baron Surrebbutter is made to say at p. 429 that "in consequence of an idle and absurd clamour on the part of the public, some inferior courts were established . . . to enable the common people to sue for small debts and damages under £20"; and that in these courts special pleading was not admitted, "because neither practitioners nor judges could be expected to understand the system properly."

[39] "Nihil tam interest certitudinis legum . . . quam ut scripta authentica intra fines moderatos coerceantur, et facessat multitudo enormis auctorum et doctorum in jure; unde laceratur sententia legum, judex fit attonitur, processus immortales, atque

that a system of case law will not work so satisfactorily if the number of courts, whose decisions are reported, is multiplied. The law is likely to be burdened with so great a mass of decisions of different degrees of excellence, that its principles, so far from being made more certain by the decisions of new cases, will become sufficiently uncertain to afford abundant material for the infinite disputations of professors of general jurisprudence. A limitation is needed in the number of reported cases. Since England secured that limitation as the result of the same set of causes which gave us our common law, English lawyers have hardly realized that it was a condition precedent for the satisfactory working of our system of case law.

In the second place, a system of case law demands a group of learned lawyers, both at the Bar and on the Bench, who are bound together by a common professional tradition. Maitland has said that, in the earliest of our Year Books, "we see that already the great litigation of the realm . . . is conducted by a small group of men. Lowther, Spigurnel, Howard, Hertpol, King, Huntington, Heyham—one of them will be engaged in almost every case." [40] Their opinions were mentioned with almost as much respect as the opinions of the judges;[41] and Parliament referred difficult points of

advocatus ipse, cum tot libros perlegere et vincere non possit, compendia sectatur," *De Augmentis* Bk. viii c. 3. Aph. 78.

[40] *P.* and *M.* i. 195 (1st Ed.).

[41] *Y. BB.* 21, 22 Ed. I (R.S.) 218, 276; 30, 31 Ed. I (R.S.) 106; 4 Ed. II (S.S.) 201.

law to them as well as to the judges.[42] The solidarity of the legal profession was increased by the growth of its organization—the formation of the rank of the serjeants, the rise of the serjeants' Inns, the development of the collegiate life of the Inns of Court.[43] It was these leaders of the profession who made, or who employed the men who made, the anonymous Year Books. It was they who, in a later age, made the Reports which were published under their names. It was they who applied to these reports an intelligent criticism, which has established a professional tradition as to which of these reports are good, which bad, which indifferent.[44] It was they who worked out in theory and applied in practice the subtle rule, to which I have already alluded, that the authority of a decision is attached, not to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case.[45]

In the third place, a system of case law demands an independent well paid bench, which is, on the whole, more able than the bar. "There is no guaranty of justice," says Professor Ehrlich,[46] "except the personality of the judge . . . The greatest task that can be given a man to discharge, Justice, requires a standard of mental and moral greatness far above the com-

[42] *Rot Parl.* i. 67.

[43] For these developments see Holdsworth, *H.E.L.* ii. 484-512, iv. 263-70, vi. 481-99.

[44] See Wallace, the *Reporters*, 24-33; cp. Pollock, *Essays in the Law* 243.

[45] Above 17-18.

[46] *Science of Legal Method* (Modern Legal Philosophy Series) ix. 65-6.

mon average." The continental system, under which the judicial profession is a branch of the civil service, and distinct from that of the advocate, is not so successful as the English in securing that standard. Professor Ehrlich has drawn attention to the contrast between the mental outlook of judges appointed under these two different systems, and the effect of that outlook on the development of legal systems.[47] He has no doubt that the best results are attained by our English system.[48] It is true that barristers have sometimes exercised some kind of censorship over the cases which they have reported. It is said that Lord Campbell, when he was a reporter of nisi prius decisions during Lord Ellenborough's tenure of the office of Chief Justice, kept a drawer labelled 'bad Ellenborough law,' in which he deposited notes of cases which seemed to him to have been wrongly decided.[49] But it is the criticism of the bench, and the use made by the bench of prior decisions, upon which the success of a system of case law in the

[47] *Science of Legal Method* (Modern Legal Philosophy Series) ix. 48-50, 66, 72-74.

[48] "It is fair to doubt whether the usual course of promotion within the bureaucracy is the best means of making the administration of justice proceed on grand lines. . . . Examples should rather be sought in Rome or in England, where the courts gather into their membership the intellectual and social flower of the nation, and where the most eminent men consider a seat on the bench the highest goal, and the most dignified completion of their life's work," *ibid.* 74-5.

[49] "Campbell was no mere stenographer; he exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He

long run depends. The decisions of the weak judges of Charles II and James II are of less value than the decisions of the judges of any other period of our legal history, because politics then exercised a greater influence upon judicial appointments than at any other period in our history. The change in the quality of the bench after the Revolution, when the influence of politics upon judicial appointments was diminished, and their influence upon the judges' tenure of office came to an end, was the condition precedent for the great work of settling the principles of the modern common law, which was achieved by the judges of the eighteenth century. A system of appointing judges which does not secure both the presence of the ablest lawyers on the bench, and security of tenure, will not operate a system of case law so successfully as a system which satisfies these conditions. Professor Trevelyan, speaking of the Act which reformed the Municipal Corporations in 1835, says, "the separation of the benches of magistrates from the town corporations, on the ground that the latter had now become elective, and that justice is incompatible with party electioneering, was regretted by one section of Radical opinion of that day, but the principle of a non-elective judiciary has been ratified by the experience and conviction of succeeding generations of Britons all over the Empire." [50]

jocularly took credit for helping to establish the Chief Justice's reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of 'bad Ellenborough law,'" Atlay, *The Victorian Chancellors* ii. 138.

[50] *British History in the Nineteenth Century* 245.

These, then, are the reasons why the system of case law has been so successfully developed in England that it has become the most characteristic feature of our common law. They are reasons which only legal history can disclose; but they go to the root of the matter; and any attempt to introduce a system of case law into a country in which these conditions do not exist, or only partially exist, will produce difficulties, inexplicable to those who have not studied the matter historically.

It is equally necessary to study our system of case law historically if we are to come to any reasoned view of its merits and defects. I have dwelt on its merits—which are obvious. Indeed the common lawyer, who looks at the achievement of his system in the modern world, may well be content to repeat the epitaph on Sir Christopher Wren's tomb in St. Paul's Cathedral, and say *Si monumentum quæris circumspice.* But no human institution is perfect; and, as we might expect, the analytical jurists, who looked rather superficially at the phenomena of their day, exercised their ingenuity in stressing the imperfections of our system of case law. Bentham's contemptuous description of it is well known: "It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me." [51]

[51] **Truth** *v.* Ashhurst; or Law as it is, contrasted with what it is said to be, *Works* v. 235.

Austin emphasized the difficulty of extracting the *ratio decidendi*, the fact that case law is made in haste, its ex post facto character, its bulk, the uncertainty as to the validity of many of its rules, its fragmentary character, its tendency to make the statute law unsystematic.[52] It is impossible to deny the truth of some of these objections. But I think that an undue emphasis is laid upon them by the manner in which the analytical jurists treat case law, not as one of the means and one of the means only, by which our common law has been developed, but as an isolated phenomenon. If we look historically at the sources of our common law, we shall see that, though case law is a principal source, it is not the only source: and that the existence of other sources of law, such as books of authority and the statutes, has gone some way to diminish some of its defects.

(2) *The Books of Authority.*

The existence of case law has reduced to comparatively small dimensions the books which our common law regards as books of authority—books, that is, which can be cited to the court in the same way as a judgment in a decided case. And, consequently, English law has avoided the difficulty which, in Roman law, Theodosius and Valentinian attempted to solve by the Law of Citations. But, though these books are small in number, they are of the very greatest importance. Indeed, it would not be going too far to say that, without them, our system of case law and our statute law

[52] Austin, *Jurisprudence*, (3rd Ed.) ii. 671-682.

could only be used and applied with the greatest difficulty.

The list of these books has never been precisely ascertained. Blackstone's list is Glanvil, Bracton, Britton, Fleta, Hengham, Littleton, Statham, Brooke, Fitzherbert, Staundforde, Coke.[53] To this list we should add Fortescue's and Hale's books, Comyns' Digest, Blackstone's Commentaries, and perhaps Viner's Abridgment. In modern times the works of Story, John Chipman Gray's book on Perpetuities, and Dicey's book on the Conflict of Laws, have almost attained this rank.

It is clear that these books fall into very distinct categories. First, there is the category of Abridgments.[54] The works of Statham, Brooke, and Fitzherbert are not only valuable indices to the Year Books, but also contain cases not found in any printed Year Book. The works of Comyns and Viner are in effect indices to, and encyclopaedias of, the whole of English law. It is clear that these Abridgments go far to obviate some of the difficulties arising from the bulk and the fragmentary character of case law. Secondly, there is the small group of books which sum up in an authoritative way a particular branch of the law. Into this category fall Staundforde's books on the Pleas of the Crown, and on the Prerogative; Hale's books on criminal and constitutional law; and, in modern times the works of Dicey

[53] *Comm.* i. 72.

[54] For the Abridgments see Holdsworth, *H.E.L.* (3rd Ed.) ii. 543-5, v. 375-7; *Sources and Literature of English Law* 104-11; Winfield, *Sources of English Legal History* Chap. VIII.

and Gray. It is clear that books such as these go far, in respect to particular branches of the law, to obviate the disadvantages arising from the difficulty of extracting the *ratio decidendi* of the cases, from the fact that case law is made in haste, and from its ex post facto character. Thirdly, the most important group of these books are those which mark important stages in the history of the law—summing up the results of an important period in the history of the law, and affording a basis for further developments. Of this group of books I must speak at somewhat greater length.

Glanvil's book summed up the achievement of the kings and statesmen who, in the eleventh and twelfth centuries, had laid the foundations of the common law.[55] Bracton's book [56] summed up the rapid progress which the common law had made, under the influence of men whose mental outlook had been shaped by the legal Renaissance of the twelfth and thirteenth centuries. Maitland called it the "crown and flower of English mediaeval jurisprudence,[57] and endorsed the opinion of Lord Campbell that Bracton "was rivalled by no juridicial writer till Blackstone arose five centuries later." [58] It was accepted in the following century as the standard text book of English law. Britton and Fleta are little

[55] Holdsworth, *H.E.L.* (3rd Ed.) ii. 188-92; *Sources and Literature of English Law* 25-6.

[56] Holdsworth, *H.E.L.* (3rd Ed.) ii. 236-43; *Sources and Literature of English Law* 27-32.

[57] P. and M. i. 185 (1st Ed.).

[58] *Lives of the Chief Justices* ii. 62.

more than summaries of it, brought up to date;[59] and Hengham's tracts[60] are little more than epitomes of certain selected passages. It was used by Coke; and the issue of the contest between the common law and its rivals would have been far more doubtful, if Coke had not been able to draw upon Bracton's treatise.[61] In modern cases it has been frequently cited and recognized as an authority.[62] From the end of the mediaeval period come the books of Fortescue and Littleton.[63] Fortescue is famous chiefly for his critical account of the state of the English constitution at the close of the Lancastrian period. His object was to analyze the causes of that want of governance which had caused the Wars of the Roses. This he did in so masterly a manner that his books had a large influence on the constitutional law of the sixteenth and seventeenth centuries. In the sixteenth century they suggested some of the measures taken by the Tudors to restore the strength of the monarchy. In the seventeenth century they supplied arguments for a limited monarchy, which were frequently and effectively used by the leaders of the Parliamentary party. Littleton's book on Tenures might, at first sight, seem to fall into the category of books dealing with a special branch of the law. But it is more than this, because the land law had been, from the first, the most im-

[59] Holdsworth, *H.E.L.* (3rd Ed.) ii. 319-22.

[60] *Ibid.* 323-4; and see Woodbine, *Four Thirteenth Century Law Tracts.*

[61] *Ibid.* 288-9.

[62] *Ibid.* 289.

[63] *Ibid.* 566-75; *Sources and Literature of English Law* 134-40.

portant branch of the common law, and, when Littleton wrote, included a great deal more than is included under that head at the present day. His book sums up the principles of the mediaeval land law as they had been developed by two centuries of judicial decision. And the summary is the more valuable because it came on the eve of the great changes in the land law, which were inspired by the new equitable principles administered in the Chancery.

Of Coke [64] perhaps the truest thing ever said was said by Maitland in a letter which he wrote to me: "Coke's books are the great dividing line, and we are hardly out of the Middle Age till he has dogmatized its results." His Reports and Institutes cover the whole field of English law, and restate it from the point of view of the sixteenth century. He brought the Year Books into line with the modern reports, and the mediaeval literature of the law into line with the modern literature; and, by so doing, assured the continuity of the development of the common law in this century of change —this century of Renaissance, Reformation, and Reception of Roman law. He was the founder of the modern common law; and, almost down to our own days, there have been many lawyers who refused to admit of any serious shortcomings in his works.

Coke was the founder of the modern common law:

[64] Holdsworth, *H.E.L.* v. 423-93; *Sources and Literature of English Law* 140-147.

Blackstone [65] summed up the manner in which the legal profession had developed it during the following century and a half. His summary, like Littleton's summary, is the more valuable, because it came just before the period when large parts of the law were recast by a new-modelled Legislature which had come under Bentham's influence. His Commentaries are a more complete and a more literary presentation of the laws of England than had appeared since the days of Bracton. They sum up the main principles of the law, which were assumed by the reformers of the nineteenth century, so that they help us to steer our way through the labyrinth of nineteenth century statutes which have changed the face of English law. Their popularity in America, both before and after the Declaration of Independence,[66] has helped to secure the continuity of the development of legal principles on both sides of the Atlantic.

Viner, the author of the Abridgement of English law, had founded the Vinerian Chair at Oxford; and Blackstone's lectures as first Vinerian professor had become the Commentaries on the laws of England. In America Nathan Dane, who, like Viner, had devoted a great part of his life to compiling an abridgement of the law, like Viner founded a professorship—the Dane Chair at Harvard. Joseph Story, the first Dane professor, wrote a

[65] Dicey, Blackstone's Commentaries, *National Review* liv. 653; Holdsworth, *Sources and Literature of English Law*, 155-160.

[66] Burke in 1775, in his speech on Conciliation with America, said, "I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England," *Works* (Bohn's Ed.) i. 467.

series of commentaries on all branches of the law, which take rank with the commentaries of Blackstone.

These books of authority and the system of case law, are the two great contributions of the lawyers to the making of our common law. They supplement one another, and correct one another's defects. The system of case law keeps the law in touch with the concrete facts of daily life, but necessarily it consists of scattered and disparate examples. The books of authority are kept in touch with daily life by the cases on which they are founded, and they correct the main defect of a system of case law by coordinating and reducing to principle the results of the cases. Our legal history shows that both are necessary parts of our common law. It would seem to follow that the study of both is a necessary part of a system of legal education.

Neither of these two sources of our law could by themselves have constructed our system of common law. A system of law must regulate all those activities of the community, and all those relations of its members, which the state deems it expedient to regulate; and those regulations must change and develop with changes in political, social, and economic needs and ideas. No body of lawyers is competent to originate these necessary regulations. The help of the Legislature is necessary to originate new rules, and to modify and correct old rules, in such a way that the law is kept abreast of the public opinion of the day. And so in any system of law, which has guided the development of a state for many cen-

turies, legislation must play a great part. This raises the problem of the relation of this legislation to the law made by the lawyers. We shall now see that it is the manner in which this problem has been solved at different periods in the history of English law, which is not the least of the causes which has made our common law a great legal system.

THE LAW MADE BY THE LEGISLATURE

From the earliest days of the common law some of its most fundamental principles have rested upon legislation—the legislation of the Norman and Angevin kings, Magna Carta, the legislation of Edward I, and the legislation of all centuries since the reign of Edward I. It is clear from the Year Books of the fourteenth and fifteenth centuries that the lawyers fully accepted the supremacy of the Legislature. It is true that the lawyers have sometimes criticized the provisions of statutes which seemed to them to contravene established legal principles, or to be plainly impolitic. It is true that they will sometimes interpret them strictly, that is in a manner which will give them a meaning in accordance with established principles. But at no period have the lawyers denied their binding force.[67] The main reason for this is the partnership in the making of laws which has, from the earliest period, existed between the lawyers and the Legislature. It would seem that the

[67] On this matter see Plucknett, *Statutes and their Interpretation in the Fourteenth Century* 26-31, 66-71; Holdsworth, *H.E.L.* (3rd Ed.) ii. 441-3; *Sources and Literature of English Law* 39-45.

existence of some such partnership is a condition precedent for the growth of a legal system; for, without it, it would be impossible to harmonize the body of technical rules and principles evolved by the lawyers, with those statutory creations of new law and changes in old law, which a changing society demands. The history of Roman law, as well as the history of English law, teaches us this lesson.

At the very beginning of the Roman Empire, "the crafty Augustus suggested the scheme of connecting the influence of the legal profession with, and subordinating it to, the new imperial system . . . This was effected by conferring upon certain of the more eminent lawyers the 'jus respondendi,' whereby their responsa would be given, as it were, under imperial sanction." [68] The same phenomenon is apparent in the later period of the Roman Empire, when the emperor had become the sole source of law. Professor Buckland tells us that "the Emperor commonly acted with the advice of a *Consilium* . . . ," and that "the leading jurists of the time were commonly members of this body";[69] and Sohm,[70] speaking of the decline of the *jurisprudentes* after the time of Modestinus, says, "the emperor alone gave *responsa* in the forma of *rescripta principis,* and the last achievement of Roman jurisprudence was to infuse its spirit into the numerous rescripts of Diocletian and his successors." In England the terms of this

[68] Moyle, *Justinian* (5th Ed.) 57.
[69] *A Manual of Roman Private Law* 19.
[70] *Institutes of Roman Law* (1st Ed.) 71-2.

partnership have varied from age to age, but it has existed right through the history of English law. An examination of terms of this partnership at different periods is essential, if we would understand both the part played by the Legislature in building up the fabric of our law, and the necessity for the cooperation of the lawyers in the framing of legislation.

I shall deal with this question under three heads—the machinery of legislation, its subject matter, and its interpretation.

(1) *The Machinery of Legislation.*

In the twelfth century there was little differentiation between the legislative, the executive, and the judicial departments of government; and the lawyers who founded our common law were also statesmen. Glanvil, who wrote or caused to be written, the earliest text book on the common law, had acted as a general, as an ambassador, as a justice in eyre, and as justiciar. He certainly carried out, and perhaps suggested, some of Henry II's legislative reforms.[71] Bracton, from 1248 till about 1257, was a member of the king's council, and heard pleas before the king himself.[72] With the rise of Parliament the legislative department of government begins to be differentiated from the executive and judicial departments. But in Edward I's reign this differentiation was only beginning. The king's council in Parliament, assisted by the judges, was the "core and

[71] Holdsworth, *H.E.L.* (3rd Ed.) ii. 188-90.
[72] *Ibid.* 233.

essence" of the Parliament:[73] and the king's council in Parliament was the body which made the laws. The chief justices still had, as members of the council, a voice in the making of laws; and the king and his justices might, after a statute had been made, put an authoritative interpretation upon it. In 1305 Hengham C. J. said to counsel, who was arguing for a certain construction of the statute of Westminster II, "None of your glosses on the statute; we know it better than you, for it was our work."[74] In 1307 Brabazon J. said that he would advise with his companions as to the meaning of 34 Edward I Stat. I, since they were at the making of it.[75] Mr. Bolland has shown that Bereford C. J. used his knowledge of the intentions of the Legislature in passing the statute *De Donis Conditionalibus*, to read into it words which were not there, with the ultimate result that the estate tail assumed the characteristics which it has in our modern law.[76]

These are illustrations which come from a very early period in the history of Parliament. It is true that in 1740 Lord Hardwicke used words which are reminiscent of them, when he said, in a case which turned on the construction of the Charitable Uses Act of

[73] Maitland, *Parliament Roll of 1305*, (R.S.) lxvii.

[74] *Y.B.* 33-35. Ed. I (R.S.) 83—the translation is Sir F. Pollock's, see *A First Book of Jurisprudence* 330-331.

[75] *Ibid.* 584.

[76] *Y.B.* 5 Ed. II (S.S.) (1311-12) xxv-xxix; Holdsworth, *H.E.L.* (3rd Ed.) iii. 114-116; for other illustrations of the close connection between the judges and the Legislature see *ibid.* ii. 308 nn. 5-8; Plucknett, *op. cit.* 23-25.

1736, that he was present at the making of that statute, and it was understood that it had no reference to personal property.[77] But he was quite well aware that, in construing a statute, regard must be paid to its words, and not to the intentions of its makers. In fact these Year Book cases are really survivals from the days when the legislative, executive, and judicial departments of government were undifferentiated. In the course of the fourteenth and fifteenth centuries the influence of the judges on the Legislature changed its shape, and was exercised upon the House of Lords and the House of Commons in two different ways.

Right down to the eighteenth century, the House of Lords consulted the judge on bills which were before the House.[78] It was not forgotten that the House, though a member of the Legislature, was also a Council of the crown, to which the judges were assistants; and, in the debate on *Habeas Corpus* bill of 1758, Lord Hardwicke pointed out the good results which ensued from the maintenance of this practice.[79] The influence

[77] Sorresby *v.* Hollins, (1740) 9 Mod. at p. 223.

[78] For example in 1758 the House took the opinion of the judges on a bill to improve the procedure on writs of *habeas corpus* in non-criminal cases, and directed them to prepare another bill, see Holdsworth, *H.E.L.* ix. 119-121.

[79] "Scarce an instance of passing such a Bill without asking the opinions of the judges, not whether it is fit upon political reasons to pass such a bill—that is a legislative consideration—but to inform your Lordships in law. Peculiar privilege and advantage of this House that the twelve judges attend here by the King's writ. Have more than once known Bills sent up from the other House, which have appeared very plausible there,

of the lawyers and judges on the House of Commons has come to be much more important; and, during the fourteenth and fifteenth centuries, it began to assume the form which it has retained right down to modern times. This connection turns on the fact that lawyers became influential members of the House of Commons. It is mainly for this reason that a partnership has been created between the lawyers and the Legislature, which has had a large influence on the machinery of legislation. That influence made itself felt in two directions. In the first place, it was, I think, mainly due to the technical skill of the common lawyers that the English Parliament, alone amongst many mediaeval representative assemblies, became a workable legislative body. No doubt Parliament was regarded, in the Middle Ages and later, as a court—but as the highest court in the land. The lawyers helped it to develop a code of procedure which enabled it to develop on its own lines, and, without ceasing to be a court, to become a real legislative body.[80] In the second place, as the result of this development, Parliament evolved a procedure of legislation by bill, which emphasized its partnership with the king in the work of legislation;[81] and

have been found, upon the better light produced by this House, to be in the highest degree improper and inexecutable, even to the conviction of the original framers of them," P. C. Yorke, *Life of Hardwicke* iii. 12.

[80] See Holdsworth, *H.E.L.* (3rd Ed.) ii. 429-434; *Sources and Literature of English Law* 43-4.

[81] *Ibid.* 438-440.

this procedure, to use Redlich's words "completed the Parliamentary edifice." [82]

I think that it was this influence of the lawyers on the machinery of legislation which is the reason why, as I said a few minutes ago, the common lawyers have always accepted the supremacy of the Legislature.[83] In many continental states, the mediaeval theory of the supremacy of the law had led to the growth of the idea that the state is governed by a set of fundamental laws, which no power in the state could change, and only the lawyers could interpret. The Parlement of Paris, for instance, right down to the end of the *ancien régime,* claimed to be able to refuse to register a law which contravened fundamental constitutional principles.[84] This attitude naturally produced a jealousy between the lawyers and the Legislature, which was one of the reasons which helped the growth of royal absolutism.[85] Mr. Armstrong, speaking of the sixteenth and later centuries, has very truly said that "the jealousy between judicature and legislature has been a prominent rock of offence in the pathway of French constitutional liberty." [86] And Dean Pound has explained clearly some of the evil results which flow from a divergence between the ideas of lawyers and legislators in our own times. "The fundamental concep-

[82] *Procedure of the House of Commons* i. 19.
[83] Above 34.
[84] Esmein, *Histoire du droit Français* 585-593.
[85] Holdsworth, *H.E.L.* iv. 168-9, 172.
[86] *French Wars of Religion* 15.

tions of Anglo-American case law are by no means those of popular thought today. Being alien in many particulars to current notions of justice, and often out of touch with the economic and social thinking of the time, it is not likely that these principles would be acquiesced in wholly, even if there were no positive force to counteract them. Such a force there is. For the popular theory of sovereignty . . . is quite as firmly rooted in the mind of the people as the eighteenth century theory of law is rooted in the mind of the lawyer . . . If the lawyer is moved to stigmatize all that does not comport with his doctrine as lawlessness, the people at large are moved to stigmatize all that does not comport with their theory as usurpation . . . This conflict between the lawyer's theory and the politician's theory weakens the force of law. The lawyer's theory often leads him to pay scant attention to legislation, or to mould it and warp it to the exigencies of what he regards as real law. But to those who do not share his theory, this appears as a high handed overriding of law . . . On the other hand, the people's theory that law is simply a conscious product of the human will tends to produce arbitrary and ill-considered legislation, impossible of satisfactory application to actual controversies." [87] In England, on the other hand, these differences have been, to a large extent, avoided.[88] Right through our history the lawyers and Parliament have been allies. Parliament has generally respected the supremacy of the

[87] *Science of Legal Method* 218-220.

[88] Below 46-49.

law; and the lawyers naturally acquiesced in the power of a body, in whose deliberations they took an important part, to create or to modify law. I have elsewhere pointed out the constitutional importance of this alliance between Parliament and the lawyers;[89] and I shall have something to say about its effects on our legal history later in these lectures.[90] At this point I wish to emphasize the fact that it is a very important factor in increasing the effectiveness of the machinery of legislation. Blackstone has said[91] that "democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained." Parliament, because it was a representative assembly, could best express the sense of the nation as to the need for legislation—it had that democratic virtue: the lawyers, by their training, were able to put that legislation into workable shape—they had that aristocratic virtue. But this benefit of the partnership between the lawyers and the Legislature is closely connected with the analogous topic of the influence of the lawyers on the subject matter of the law.

(2) *The Subject Matter of Legislation.*

The influence of legislation as a source of law has varied from century to century; but in all periods the

[89] Holdsworth, *H.E.L.* (3rd Ed.) ii. 430-1, 433-4, iv. 174, 187-189, v. 444, 445, vi. 101-103; for the idea that limits are set to the sovereignty of Parliament by the demands of natural justice, see below.

[90] Below 62-3, 66-69.

[91] *Comm.* i. 50.

influence of the lawyers upon its subject matter has been great. In order to indicate the place which the statutes have taken as one of the sources of our law, I must say something, in the first place, of the importance of the statutes at different periods of our legal history, and their influence upon different branches of our law; and, in the second place, of the influence of the lawyers in determining their form.

(*i*) *The Influence of the Statutes upon the Common Law.*

The enacted law of Henry II's reign—enactments like the Assizes of Clarendon and Northampton, the Constitutions of Clarendon, and the legislation which established the Grand Assize and the Possessory Assizes—laid the foundation of important parts of the common law. But Parliament had not then arisen; the legislative power rested with the king, advised by his Curia Regis; and these enactments, having been worked into the great body of case law, have come to be regarded, as Hale said, as parts of the common law.[92] It is Edward I's reign—the reign in which the form of the constitution began to take its modern shape—which is the first great period of statute law. Hale considered that in the statutes of Edward I's reign could be seen

[92] *Hist. Com. Law* 9; and the same thing is true of the older sources of Roman law. Girard, *Droit Romain* 70, says "au lieu de remonter aux textes originaux des lois, des senatus consults, des edits par exemple, on prenait comme textes les ouvrages des commentateurs."

"the scheme, mould, and model of the common law";[93] and with this opinion Maitland agrees.[94] In the fourteenth and fifteenth centuries there are important statutes, such as the Statute of Treasons and the Statutes of Labourers, but they do not mark out the leading lines of legal development. The next great period of statute law is the age of the Tudors—the age of transition from mediaeval to modern. The creation of the new relations between church and state, which were rendered necessary by the Reformation, were regulated by statute. It was by statute that a new system of local government, based on the justices of the peace and the parish, was created. A large group of statutes laid down the guiding principles which regulated commerce and industry down to the period of the industrial revolution. The statutes of Uses and Wills were the foundation of the modern English land law, till the reforms which came into effect in 1926. If we except the statute of Tenures of 1660, and the statute of Frauds of 1677, the great legislation of the Stuart period is almost entirely constitutional in its interest. It was then that the Petition of Right, the legislation of the Long Parliament, the Habeas Corpus Amendment Act, the Bill of Rights, and the Act of Settlement, finally fixed the law of the constitution. The eighteenth century is a century of legislative quiescence. There are very few eighteenth century statutes which are important in English legal history. At the beginning of the nineteenth century

[93] *Hist. Com. Law* 194.

[94] *Constitutional History* 19-20.

the industrial revolution, the influence of the ideas propagated by the French Revolution, and the influence of the ideas propagated by Bentham, inaugurated a period of far reaching statutory change, which has brought the laws and institutions of England into harmony with the ideas and the needs of this new age.

Of the influence of this great body of statutes upon different branches of English law it is difficult to speak summarily. But I think that it would be true to say this: It is on matters of public law, or on matters which affect the economic life of the nation, that the influence of the statutes has been the strongest. On matters of private law, such as the law of contract and tort, it has been the weakest. It is true that, from the earliest times, the influence of the statutes on the land law has been marked.[95] But this is due to two reasons. In the first place, in a state in which the land law was so thoroughly feudalized[96] as it was in England, the land law was closely connected with public law. In the second place, the land law must always be closely connected with the topics of commerce and industry. Apart from the land law, the Legislature has been content to leave the task of developing private law to the lawyers. It

[95] As to this see a paper by the present writer in *L.Q.R.* xlii. 161-168.

[96] By feudalized I mean governed wholly by the conception of tenure: Maitland, speaking of the twelfth and early thirteenth centuries, says, P. and M. i. 210, "every acre of English soil and every proprietary right therein have been brought within the compass of a single formula, which may be expressed thus:— *Z tenet terram illam de . . . domino Rege.*"

has only intervened occasionally to amend and to supplement. The best proof of this is the fact that, in the nineteenth century, the most important series of Acts dealing with private law are codifying Acts, such as the Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, which simply put in a convenient statutory form the principles evolved by the lawyers.

These codifying Acts are perhaps the best illustration of the influence of the lawyers in determining the form of the statutes. But, as we shall now see, they are by no means a solitary instance.

(*ii*) *The Influence of the Lawyers in Determining the Form of the Statutes.*

We have seen that in the twelfth and thirteenth centuries, when the functions of government were still undifferentiated, the judges took a large part in framing the statutes; and that they used their knowledge of the intentions of the Legislature to assist them in interpreting them.[97] This was no longer possible when the executive, the legislative, and the judicial departments of government were separated. But the lawyers continued in another way to exercise an influence over the form of the statutes. We know little as to the way in which the mediaeval statutes were framed. But we do know that the lawyers were, from the earliest times, influential members of the House of Commons; and we do know that, from the sixteenth century onwards, they took an important share in framing all kinds of

[97] Above 37.

statutes. It is true that Blackstone repeats Coke's complaint that the common law was sometimes spoiled by "Acts of Parliament, overladen with provisos and additions, and many times on a sudden penned and corrected by men of none or very little judgment in law," and his regret for the good old days in which the lawyers were more frequently consulted.[98] But, in spite of these two great authorities, I think it is clear that, all through our history, the lawyers helped to frame the important statutes which affected legal doctrine. Let us look at one or two illustrations.

I have elsewhere shown that the Statute of Uses was the result of a deal between the king and the lawyers;[99] and that it was by no means so inefficacious a statute as has been sometimes supposed.[100] That the lawyers had some share in drafting it is, I think, clear from the words used by Bacon of its draftsmanship. He says that it was "the most perfectly and exactly conceived and penned of any law in the book," and, "the best pondered in all the words and clauses of any statute that I find." [101] The Elizabethan statutes, which were the foundation of the poor law, were hammered out by a large committee of the House of Commons. It sat for nearly the whole of the autumn session of 1597, and it included among its members both Coke and Bacon.[102]

[98] 2 Co. Rep. Pref.; *Bl. Comm.* i. 10-11.

[99] Holdsworth, *H.E.L.* iv. 453-61.

[100] *Ibid.* 467-473.

[101] Reading on the Statute of Uses, *Works* (Ed. Spedding) vii. 416.

[102] Leonard, *Early History of English Poor Relief* 74-5.

The Statute of Tenures of 1660, which did much to get rid of many obsolete mediaeval technicalities which infested the land law, was introduced by the solicitor-general Heneage Finch,[103] who afterwards became Lord Chancellor Nottingham—the father of modern equity and the creator of the modern rule against perpetuities; and it is not unlikely that its drafting owed something to him. Lord Nottingham and Chief Justice North, the future Lord Keeper Guildford, are mainly responsible for the draftsmanship of the Statute of Frauds; and they were assisted by Leoline Jenkins, the judge of the Admiralty and Prerogative courts, and by several of the judges of the common law courts.[104] Both civilians and common lawyers helped to draft the Statute of Distributions.[105] As we have seen, in the seventeenth and eighteenth centuries, the judges were frequently called in by the House of Lords to assist them in their legislative functions.[106] Bentham acknowledged their influence; and he never made a greater mistake than when he condemned it.[107] The legislation of the nineteenth century, which has changed the face of so many different branches of English law, was

[103] *Dict. Nat. Biog.*

[104] See Holdsworth, *H.E.L.* vi. 380-84.

[105] Holdsworth, *H.E.L.* (3rd Ed.) iii. 559-60.

[106] Above 38.

[107] "In the making of this [statute law,] through the means of their partners in trade in both houses, they [the judges] have at all times possessed and exercised a most baneful, and if not altogether irresistible, scarce ever resisted influence," *Works* (Ed. Bowring) v. 93.

founded upon reports of royal commissions, which were staffed by the ablest lawyers of the day. One of the most difficult and most successful of these Acts—the Act abolishing Fines and Recoveries—was drawn by Mr. Brodie, the most eminent conveyancer of his day.[108] So skilfully was it drawn that it has needed hardly any judicial interpretation.[109] Our new code of property law, which came into effect on January 1st 1926, is the work of two eminent conveyancers—Sir Benjamin Cherry assisted by Sir Arthur Underhill,[110] and is, to a large extent, based on nineteenth century legislation or proposals for legislation, for which a long line of eminent conveyancers is responsible.[111]

(3) *The Interpretation of Legislation.*

Under our system of case law the judges have the last word as to the meaning to be put upon the statutes. A statute means what they say it means, unless and until their interpretation is overruled by a later statute. This power of the judges emphasizes the fact that the efforts of both the Legislature and the lawyers are needed to construct a workable legal system. In the first place, this power ensures that, whenever it is possible, statutes are so interpreted that their provisions will be brought into harmony with the existing system of common and

[108] *Law Review* xxi. 348-354.

[109] "This Act was framed by one of the most eminent real property lawyers of his day, and one of the most skilful draftsmen of the age," Bell *v.* Holtby (1873) L.R. 15 Eq. at p. 189 *per* Malins V.C.

[110] *L.Q.R.* xlii. 179-180.

[111] *Ibid.* 168-177, 180-181.

statute law. Coke, in *Heydon's Case,* says that the four considerations, which must be present to the mind of the judges in interpreting a statute, are the state of the common law before the making of the Act, the mischief for which the common law did not provide, the nature of the statutory remedy, and the reason of the remedy.[112] In the second place, this power enables the Legislature to see what are the defects in its own work. A series of cases upon an Act will lead to the making of amending Acts; and the time will come when, as a result of these Acts and the cases which interpret them, a satisfactory consolidation Act can be made. The history of our Company Acts, down to the Companies Consolidation Act 1908, is a good illustration of this process.

At all periods of our legal history the effectiveness of legislation has been due to the cooperation of the lawyers. The reason for the failure of the far reaching legislative proposals made during the Commonwealth was the fact that the legal profession were hostile, and used their talents to delay and obstruct.[113] It would seem, therefore, that our legal history proves that, for successful legislation, the cooperation of the lawyers

[112] "And it was resolved . . . that for the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered:—1st What was the common law before the making of the Act. 2nd What was the mischief and defect for which the common law did not provide. 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And 4th the true reason of the remedy," Heydon's Case (1584) 3 Co. Rep. at f 7 b.

[113] See Holdsworth, *H.E.L.* vi. 422-23, 429.

with the Legislature is needed. The lawyers, because they spend their lives in enforcing and applying the law, have a clearer idea than most laymen of the form which suggested legislation should take, of the clauses which are needed to make it effective, and of the manner in which it can be fitted in with existing principles. The analytical jurists of the school of Austin and Bentham, who regarded statute law as the model of all law, and a complete code as the ideal at which all legal systems should aim, considered it to be an objection to case law that it made the statute law "imperfect, unsystematic, and bulky." [114] But historical jurists, who are regarding, not only the present form of our common law, but also its contents, the manner in which it has been developed from century to century, and the machinery for its future development, must take a different view. They must acknowledge that it is to the partnership between the Legislature and the lawyers that our common law owes the great position which it holds in the world of today. Without the efforts of the lawyers the statute book would be a lifeless body of regulations, uninspired by the quickening breath of principle. Without the efforts of the Legislature, the lawyers' rules would be in danger of becoming so fixed

[114] Austin, *Jurisprudence*, (3rd Ed.) ii. 681; as Dean Pound has said (*Science of Legal Method* 211) Bentham and Austin thought that a perfect code was possible. "Accordingly Austin named as a defect of the French Civil Code what has proved to be the chief source of its success, namely, that it was not intended to be complete, but was intended to be supplemented and explained by various subsidia."

and technical that they would lose touch with the concrete facts and needs of daily life.[115]

Blackstone, in a famous passage in his Commentaries, [116] said that the true excellence of the English constitution consisted in the fact that "all the parts of it form a mutual check upon each other." The House of Commons is a check upon the House of Lords, and the House of Lords upon the House of Commons; the king is a check upon both; and the king is checked by both the Houses. "Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest . . . while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community." These words of Blackstone were not wholly true when they were spoken, for, even then, the House of Commons was the predominant partner in the constitution; but they then contained a large element of

[115] "Laws are not ends in themselves; they are means toward the administration of justice. Hence within somewhat wide limits courts must be free to deal with the individual case so as to meet the demands of justice between the parties," *ibid.* 207.

[116] *Comm.* i. 154-155.

truth; and Lord Hardwicke would have agreed with them.[117] In their application to the English constitution they have become less true since the Reform Act of 1832 and its successors. But they had and still have a very large element of truth in their application to the working of the agencies by which the system of our common law has been developed. Legal history shows that the lawyers, through the agency of decided cases and books of authority, have worked with the Legislature to produce that system. It follows that we cannot understand either the secret of the efficiency of these sources of our law, or their relation to each other, unless we study the history of the conditions in which they have originated, and in which they have worked. I think that this understanding, which can only be acquired by a study of legal history, is needed alike by statesmen, by practising lawyers, and by teachers of law. By statesmen, because a knowledge of the real character of an institution, which it is desired to regulate or reform, is a condition precedent to successful regulation or reform; by practising lawyers, because it is necessary for all artists or artificers to know something of the nature and the capacities of the tools and materials which they must employ; by teachers, because

[117] In his speech on the *Habeas Corpus Bill* of 1758 he said, "Let us stand upon the ancient ways. Leave the legislative power where it is: the executive power where it is; the power of beginning bills of supply where it is, and the power of judicature where it is. This is the only way to preserve this limited monarchy upon which the Constitution, this happily mixed government, stands," P. C. Yorke, *Life of Hardwicke* iii. 15.

a program of legal studies must be influenced by the nature of the sources which have gone to make the legal system which is to be taught.

I hope to show you in my next lecture that this historical knowledge, which is needed to understand the sources of our common law, is as necessary, perhaps more necessary, if we would understand the evolution, the present form, and the effects of the working of important parts of our legal machinery.

II. THE COMMON LAW'S CONTRIBUTION TO POLITICAL PRACTICE AND THEORY

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In my first lecture I tried to show you that it is impossible to understand the manner in which the existing sources of English law worked together in the past, and are working today, to produce our modern common law, without some knowledge of their history. We saw that one of the lessons taught us by that history was the importance, first, of a learned, self-governing legal profession; secondly, of a strong independent bench of judges, appointed from the leading members of that profession, and enjoying security of tenure; and, thirdly, of a partnership of some sort in the work of legislation between this legal profession and the Legislature. The fact that our common law has been distinguished by these characteristics from an early period in its history goes far to explain the magnitude of its achievement. In this lecture I shall show you that the same causes have helped to create two very important pieces of the legal machinery of the common law—the writ of *Habeas Corpus,* and the institution of the Jury. I shall show you that, as in the case of the sources of our law, so in the case of these two pieces of legal machinery, we cannot understand the conditions of their successful working, or the great effects which they have had, not

only on our substantive law, but also on our political education and political thought, without some study of their history as strictly legal institutions.

It is a commonplace of legal history that the form taken by the legal machinery of an early period in the history of law has a great and lasting influence on the substantive law of later ages. There are no more striking illustrations of this truth than these two characteristic institutions of our common law. Both originated simply as part of the machinery of litigation. Both, by reason of their development by the lawyers and the Legislature, under the pressure of changing political and legal ideas, have become famous not only in the British Empire and America, but also in lands which do not own the sway of our common law. Both, by the manner in which they have defined the public and private rights of citizens, have helped to give these citizens a political education, and, in this way, to form their political instincts. Both are at the root of some very characteristic features of our public law—both constitutional and criminal; and the institution of the Jury is the principal cause for the form of two of the most distinctively native branches of our common law —the law of evidence and the law of pleading.

I propose in this lecture to deal first with the writ of *Habeas Corpus,* and then with the institution of the Jury. I shall show you how they originated, how they were developed by the combined efforts of the lawyers and the Legislature, and how they have affected our

political ideas and the structure of our common law. Lastly, I shall say something of the light shed by the history of these two institutions, upon the attitude of the common law and the common lawyers to the discussion, by legal and political philosophers, of the ideas underlying these and other contributions of the common law to the world's stock of legal and political ideas.

THE WRIT OF HABEAS CORPUS

It was with some reason believed by our older lawyers that the writ of *Habeas Corpus* had a very direct connection with the thirty-ninth clause of the Great Charter of 1215.[1] This famous clause of the Great Charter provides that "no freeman shall be taken or imprisoned or disseised or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or by the law of the land." There has been much learned controversy in these latter days as to the true interpretation of these words; and from this controversy certain conclusions have emerged.[2] First, it is clear that the words "lawful judgment of his peers" do not refer to trial by jury, but to a trial by a tribunal of the old type, in which all the suitors were judges both of law

[1] Coke, *Second Instit.* 52-55, deals with the writ in his commentary on this clause; and Bl., *Comm.* i. 134-5 includes this clause of the Charter in the list of statutes below 66 7, which improved the procedure upon the writ.

[2] See Holdsworth, *H.E.L.* (3rd Ed.) i. 59-63, ii. 214-15, and the references there cited.

and fact, and in which these suitors were not the inferiors of the accused. Secondly, it is probable that the words "by the law of the land" mean, as Coke said,[3] "by due process of law"—no violence is to be done to person or property except by due process of law. If this interpretation is correct it may, I think, be said that the writ of *Habeas Corpus* guarantees that part of the principle laid down in this clause of the Charter which refers to personal liberty. It is not, of course, true to say that the framers of the Charter were thinking of the writ of *Habeas Corpus,* for that writ had not then been invented. But it is true to say that, in later centuries, the writ of *Habeas Corpus* was so developed that it became the most effectual piece of legal machinery ever devised by any legal system, for remedying infringements of the principle that there ought to be no interference with the right of personal liberty except by due process of law. The reason why this development was possible is a curious chapter in our legal history, which illustrates the fact that there can be no real understanding of some of the most salient characteristics of our constitutional law without a study of our legal history.

The story can be best understood if we divide it under the following heads:—(i) the principle laid down by the Charter, and its development in England; (ii) the writ of *Habeas Corpus,* and its connection with this

[3] For the true sense and exposition of these words see the *Statute* 37 E. 3 cap. 8, where the words by the law of the land are rendered, without due process of law," *Second Instit.* 50.

principle; and (iii) the development of the writ by the Courts and the Legislature.

(i) *The principle laid down by the Charter, and its development in England.*

A fundamental idea in mediaeval thought was the idea that the world was ruled by laws—the laws of God or man.[4] As Stubbs has said,[5] "the idea of right, as embodied in law, was the leading idea of statesmen, and the idea of rights justified or justifiable by the letter of the law, was a profound influence with politicians." It was therefore wholly consonant to this idea that the barons in the Charter should demand that the measure of their rights to the free enjoyment of their property and liberty should be determined by the law of the land. England had no peculiar property in this idea. But what is peculiar to England is the way in which it was developed. In the first place, what did the lawyers mean by the law of the land? In my last lecture I said something of the way in which the lawyers, from the first, had accepted the binding force of enacted law.[6] Statutes made by Parliament, no less than the common law, were part of that law of the land, the supremacy of which had been assumed by the Charter. All through the Middle Ages the Charter was confirmed;[7] and all through the Middle Ages new statutes had attempted to

[4] Holdsworth, *H.E.L.* (3rd Ed.) ii. 121-2, 253-4.
[5] *Lectures on Mediæval and Modern History* 241-2.
[6] Above 34.
[7] Holdsworth, *H.E.L.* (3rd Ed.) ii. 219.

safeguard the principle of the supremacy of the common and statute law.[8] In the second place, during the fourteenth and fifteenth centuries, the common lawyers had given a new meaning to the principle that the law was supreme, which was the product of altered political conditions. In those centuries the common law courts had become tribunals, which were separate from and independent of the king and his Council. They were jealous of the extraordinary jurisdiction still exercised by the king and his Council; and, as Parliament was equally jealous of the power of the crown, Parliament and the common law courts saw eye to eye.[9] Therefore these mediaeval statutes aimed at curtailing the extraordinary jurisdiction exercised by the king and his Council, by asserting the supremacy of that common law and statute law, which the common law courts interpreted and applied. 'Due process of law' was interpreted as 'due process of the common law.'[10] Thus it happened that the common lawyers were directly interested in asserting the supremacy of a law, which Parliament

[8] For these statutes see *ibid.* i. 487.

[9] *Ibid.* 486-487.

[10] Coke, *Second Instit.* 50, cites the statute 37 E. 3 cap 8 to prove that this was the correct interpretation. It is probable that this was too narrow an interpretation; Bacon's view, which is I think historically correct, was that, "*lex terrae* . . . is not to be understood only of the proceedings in the ordinary courts of justice, but that his Majesty's Prerogative and his absolute power incident to his sovereignty is also *lex terrae*, and is invested and exercised by the law of the land, and is part thereof," Spedding, *Letters and Life* iv. 350; and see Holdsworth, *H.E.L.* vi. 34-37.

was prepared to agree with them in defining to be the law which they administered in their courts. They were naturally ready to assist, by all the means in their power, a principle which asserted their superiority to rival bodies of law administered by the Council, the Chancery, the Admiralty, and other courts. It is, I think, for this reason that they were willing to adapt the writ of *Habeas Corpus* in such a way that it could be used to assert the principle of the supremacy of the common law.

(ii) *The writ of Habeas Corpus, and its connection with this principle.*

The writ of *Habeas Corpus* was in its origin a judicial writ, directed to securing the presence in court of persons, parties, jurors, or, in later days, witnesses—needed for the trial of an action; and some forms of the writ never ceased to be used merely as part of the process of the courts.[11] But a writ, which can thus be used to produce persons, whose appearance the court for any reasons desires, can be converted into a valuable weapon of offence if conflicts of jurisdiction arise; and, right down to the middle of the seventeenth century, the history of the common law courts is full of these conflicts of jurisdiction. In the Middle Ages the contest was mainly with the local and franchise courts; and it was during this period that the writ showed its value as a weapon, by means of which the common law courts could not only defend their jurisdiction, but also in-

[11] *Bl. Comm.* iii 129-131.

crease it at the expense of rival jurisdictions.[12] From the latter part of the fifteenth, and during the sixteenth centuries, the contest was with rival central courts, such as the Chancery, the Council, the Star Chamber, and the Admiralty;[13] and it was during the struggle with some of these courts that it began to be discovered that it could be used to protect the liberty of the subject.[14] Thus, in *Glanvil's Case* in 1615,[15] precedents of Elizabeth's reign were cited for the release, by means of this writ, of persons committed to prison by the Chancellor or the Council;[16] and it was frequently used to release persons committed to prison by the Court of Requests,[17] the Admiralty,[18] and the Court of High Commission.[19] But I think that it was the manner in which it was used to get the release of persons committed to prison by the Council, which decisively connected it with the protection of the liberty of the subject. It was against imprisonments by the king and Council for causes unknown to the common law that mediaeval statutes had been directed; and, in the sixteenth century, many of the lawyers, and a growing party in Parliament, interpreted both these statutes and the words of Magna Carta, which was sometimes referred to in these statutes, as

[12] Holdsworth, *H.E.L.* ix. 109-110.
[13] *Ibid.* 110-111.
[14] *Ibid.* 113-114.
[15] *Moore* 838.
[16] *Ibid.* at p. 839.
[17] *Select Cases in the Court of Requests* (S.S.) xxxix, xlii.
[18] *Select Pleas of the Admiralty* (S.S.) ii. xlvi-xlvii.
[19] Coke, *Fourth Instit.* 333-4.

meaning that all imprisonment was illegal except by due process of the common law.[20] Clearly a writ by means of which persons imprisoned by the Council, in contravention of this principle, could get their release, was coming to be very directly connected with the safeguarding of personal liberty.

The use by the common law courts of the writ of *Habeas Corpus* to release persons committed by the Council was beginning to cause friction at the latter part of the sixteenth century; and the judges made an attempt in 1591 to settle the rules applicable to these cases.[21] But the result of the resolution to which they came in 1591, and of the cases which had called it forth, was to advertise the writ as the best remedy for those who considered that they had been unlawfully imprisoned by the crown. It was inevitable, therefore, that, when the contest between Parliament and the Prerogative began in the seventeenth century, the writ should take its place as the great constitutional weapon for the protection of the liberty of the subject. Coke, by his action in joining the Parliamentary opposition in the Parliament of 1620,[22] cemented the old standing alliance between the common lawyers and the House of Commons. It is not therefore surprising to find that a writ, which was efficacious, both to protect the wide jurisdiction claimed by the common law courts, and to protect the liberty of the subject, should at once as-

[20] Above 62 n. 10.

[21] Holdsworth, *H.E.L.* v 348, 423, App. I, vi 32-34.

[22] *Ibid.* v 444.

sume a position of great prominence. It assumed this position in *Darnel's Case,* and in the subsequent debates in Parliament on the liberty of the subject.[23] It was said by Selden, in 1628, to be "the highest remedy in law for any man that is imprisoned.[24] Naturally after the Great Rebellion its modern position in our constitutional law was unquestioned. In 1670 Vaughan C. J. said, "It is now the most usual remedy by which a man is restored again to his liberty, if he have been against the law deprived of it." [25]

(iii) *The development of the writ by the courts and the Legislature.*

Just as it was the alliance between the common lawyers and the House of Commons which made the writ the principal remedy for the protection of the liberty of the subject, so it was the combined efforts of the lawyers and the Legislature, from the middle of the seventeenth century down to our own day, which have gradually perfected it.

The contributions of the Legislature are the statutes of 1641 and 1679, the Bill of Rights, and the statute of 1816. The statute of 1641 [26] applies to commitments by the king, Council, or any court exercising a jurisdiction similar to that of the Star Chamber. Its provisions illustrate the fact that the writ had become

[23] Holdsworth, *H.E.L.* vi 34-38.
[24] 3 S.T. 95.
[25] Bushell's Case, (1670) *Vaughan* at p. 136.
[26] 16 Charles I c. 10 § 6.

so completely identified with the cause of the liberty of the subject, that the Legislature saw that the expedient of improving the machinery of the writ, was far more efficacious than those general declarations of the law, which had been made in the Petition of Right. The statute of 1679 [27] is of course the principal statute. It went a long way to adapt the writ to the great position which it had come to occupy in constitutional law. That it was efficacious can be seen from the fact that this statute and the Test Act were the two statutes which James II most wished to see repealed.[28] Nevertheless it had defects. The Bill of Rights removed one of them, by enacting that excessive bail was not to be required as a condition of release.[29] Another defect was the fact that the Act of 1679 applied only to criminal cases. An attempt was made in 1758 to apply the speedy procedure provided by the Act of 1679 for criminal cases, to cases where persons were deprived of liberty, otherwise than by reason of a criminal charge. But the bill to effect this failed to become law.[30] The statute of 1816 [31] both effected this object, and provided that in these non-criminal cases a judge should

[27] 31 Charles II c. 2: for the history and provisions of the Act see Holdsworth, *H.E.L.* ix 117-118.

[28] Foxcroft, *Life and Letters of Halifax* i 450, citing a letter of Barillon to Louis XIV.

[29] 1 William and Mary Sess. 2 c. 2 § 1 (10).

[30] For this bill see Holdsworth, *H.E.L.* ix 119-121; P. C. Yorke, *Life of Hardwicke* iii 2-19; at pp. 6-14, 14-17 Lord Hardwicke's notes of his very conclusive speeches against the bill, as sent up by the House of Commons, are printed.

[31] 56 George III c. 100.

be able to inquire into the truth of the return to the writ.

The contribution of the lawyers consisted in their willingness to improve the speed and efficiency of the remedy—a tradition which they inherited from the days when the writ had been used to protect their own jurisdiction.[32] Thus, in the eighteenth century, they invented a procedure by which they could indirectly test the truth of a return to the writ; and they applied to the writ in civil cases some of the rules introduced by the Act of 1679 for criminal cases.[33] Since the Judicature Acts, in the latter part of the nineteenth and in the present century, they have evolved a set of rules, as to the manner in which the correctness of decisions upon applications to issue the writ, can be questioned, which illustrate the same desire to preserve its efficiency. It is now settled that there can be no appeal from a decision to award the writ, or to discharge a prisoner on the return to the writ; but that, except when a judgment refusing to issue the writ is a judgment in a criminal cause or matter, an appeal lies from a refusal to issue the writ.[34]

This history further illustrates two of the lessons which, as I showed in my first lecture, can be learned from our legal history. First, the beneficial effects of that partnership between the lawyers and the Legisla-

[32] Above 63-64.

[33] Holdsworth, *H.E.L.* ix 120-121.

[34] Cox *v.* Hakes (1890) 15 A.C. 506; Secretary of State for Home Affairs *v.* O'Brien [1923] A.C. 603; Holdsworth, *H.E.L.* ix. 122-124.

ture, which we see all through our legal history; and, secondly, the need for a strong, a learned, and independent bench. Even the famous Act of 1679 did not, before the Revolution, effect all that it effected after the Revolution. Judges who hold office 'during the good pleasure' either of a king or a democratic assembly, can never be such efficient custodians of the rights of the subject, as those who hold office by the more secure tenure which was provided by the Act of Settlement. In addition, this history shows us the origin and some of the effects of two important characteristics of our constitutional law which Dicey has emphasized. The first of these characteristics is the supremacy of the law. The second is the fact that the principle of personal liberty, and other similar principles, the declaration of which play so great a part in many written constitutions, are in England assumed; so that attention is directed to the remedies for their infringement; and the principles have, in effect, come to be deduced from the cases in which the scope and application of these remedies have been determined. Let us glance for a moment at the way in which the machinery of the writ of *Habeas Corpus* has helped to produce these two characteristics of our constitutional law.

(i) We have seen that it was the maintenance and strengthening of the alliance between the lawyers and the House of Commons which had made it possible to transform a judicial writ, which was originally merely a part of the machinery of the process of the court, into an effectual remedy for the protection of the

liberty of the subject.[35] The common lawyers had inherited the mediaeval tradition of the supremacy of the law; but, in their hands, that mediaeval tradition had been modified in two directions. In the first place, the law which they regarded as supreme was their own common law;[36] and, in the sixteenth and seventeenth centuries, when the conflict between the common law and the law administered in many rival courts was becoming acute, they claimed that the common law, by virtue of its supremacy, was entitled to settle all conflicts of jurisdiction, and to assume jurisdiction in all cases in which some rival court could not prove its title. As the result of the constitutional controversies of the seventeenth century, the common lawyers substantially realized this claim. "The common law," said Holt C. J. in *Shermoulin v. Sands*,[37] "is the overruling jurisdiction in this realm; and you ought to entitle yourselves well to draw a thing out of the jurisdiction of it." Thus the supremacy of the law had come to mean the supremacy of the common law. In the second place, as I told you in my last lecture, the common lawyers from an early period admitted that their common law could be altered and added to by the Legislature.[38] And, since the Parliamentary party in the seventeenth century were, on political grounds, opposed to the jurisdiction wielded by the Council and the

[35] Above 62-3.
[36] Above 62.
[37] (1697) 1 Ld. Raym. at p. 272.
[38] Above 34.

Star Chamber, it was quite ready to concede the supremacy of a common law which it could control. Thus the supremacy of the common law was retained, but it had come to be so interpreted that it was not inconsistent with the supremacy of Parliament.

Parliament and the common lawyers had won their battle with the help of mediaeval precedents; and though the mediaeval ideas, which had inspired those precedents, had been modified to suit the needs of a modern state, they still retained some of their original spirit. In particular, as the history of the writ of *Habeas Corpus* shows, Parliament and the common lawyers were careful to guard the principle of the thirty-ninth clause of the Great Charter, that a man could not be imprisoned except by due process of law. That in effect meant that any restraint of liberty must be proved to be legally justified, and that all restraints which could not be thus justified, were illegal. That this principle so stated, and safeguarded by the writ of *Habeas Corpus,* was a better protection to liberty than any number of abstract declarations of right, can be seen by the famous *Sommersett's Case,*[39] in which the idea that the status of slavery was recognized by English law was finally given its quietus. In the eighteenth century the slave trade was a lucrative business, in which many had an interest. Yorke and Talbot, two of the greatest lawyers of the day, had given it as their opinion that the status of slavery was recognized by English law, so that a master could bring his slaves to

[39] (1771) 20 S.T. 1.

England without losing his rights over them;[40] and Yorke when he became Lord Chancellor Hardwicke had adhered to this opinion.[41] Lord Mansfield, following a decision of Holt C. J.,[42] decided that this was not law; and that Harrison,[43] in Elizabeth's reign, had correctly stated the law when he said that "if any [slaves] come hither from other realms, so soon as they set foot on land they become as free in condition as their masters." As I have said elsewhere,[44] the fact that Lord Mansfield refused to follow the commonly received view of the merchants, and was induced to give a decision opposed to that view, after hearing an argument based mainly on the mediaeval law as to villeinage, probably surprised many of his contemporaries as much as an opposite decision would have surprised us. But I think the decision was largely due to maintenance of the view, that any interference with liberty must be justified by law. There was legal warrant for recognizing the status of a villein: there was none for recognizing the status of a slave. As Lord Mansfield said at the close of his judgment, "Whatever inconveniences may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." [45]

[40] (1771) 20 S.T. at p. 81; Pearne *v.* Lisle (1749) *Ambler* at pp. 76-7.

[41] Pearne *v.* Lisle (1749) *Ambler*, 75.

[42] Smith *v.* Brown (1707) 2 Salk. 666.

[43] "Description of England," cited Savine, *Royal Hist. Soc. Tr.* xvii 239.

[44] *H.E.L.* (3rd Ed.) iii 508. [45] 20 S.T. at p. 82.

(ii) *Sommersett's Case,* which was decided on a writ of *Habeas Corpus,* is an excellent example of the fact that the principle of personal liberty is assumed; and that, in practice, its ambit depends upon the scope and application of the remedy for its infringement.[46] And the fact that it is so regarded has afforded an answer to the great theoretical difficulties, which were felt in the early part of the seventeenth century, of giving so wide a definition of the principle of personal liberty, that the executive government was deprived of all power to act in the interests of the public safety in a time of emergency.[47] It was largely for this reason that the king for so long refused to pass the Petition of Right;[48] and it was because the House of Commons distrusted the king that it refused to insert any saving clause. "At this little gap," said Selden,[49] "every man's liberty may in time go out." In later days it has sometimes been necessary to suspend the right to get a writ of *Habeas Corpus;* but this can only be done by an act, not of the executive, but of the Legislature;[50]

[46] Christian, commenting on Blackstone's statement, *Comm.* i 127, that liberty is so deeply "rooted even in our soil" that a slave becomes free as soon as he lands in England, says, "it is not to the soil or air of England that negroes are indebted for their liberty, but to the efficacy of the writ of *habeas corpus.*"

[47] Holdsworth, *H.E.L.* v 451, vi 37-8.

[48] *Ibid.* v 452, vi 38.

[49] 3 S.T. at p. 151.

[50] As Blackstone says, *Comm.* i 136, a power to imprison arbitrarily is sometimes necessary if the state is in danger; "but the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so

and in England it is not possible by a single act of the executive or the Legislature to suspend all constitutional guarantees, or to proclaim a state of siege.[51] The particular rights suspended and the new powers given to the government must be enumerated. And a suspension of the right to get a writ of *Habeas Corpus* is a far less extensive interference with the liberty of the subject than a measure which wholly suspends the right to personal liberty.[52] That right remains; and, when a person who has been imprisoned is released, he can, unless his right to bring the action is barred by an Act of Indemnity or otherwise, assert it by an action for false imprisonment, in which he will get heavy damages if in fact the imprisonment was not justified.[53]

The history of the evolution of the writ of *Habeas Corpus* shows us the large effects upon the law of the form taken by a piece of legal machinery. Its development was one of the happiest results of that partnership between the lawyers and the Legislature to which the common law owes so much; and its successful application to safeguard the principle of personal liberty was the work of the judges. But the common law has never

great, as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reasons for so doing."

[51] Dicey, *Law of the Constitution* (7th Ed.) 197, 226.

[52] *Ibid.* 224-6.

[53] *Ibid.* 228-233.

relied for its efficiency wholly on the work either of the lawyers and judges, or of the Legislature. It is the singular good fortune of the common law that it has been able to devise another piece of legal machinery, by which the ordinary layman has been given a share in its administration with the result that the law has been kept in touch with the public opinion of the day, and the average citizen has acquired that sort of critical affection for it which is the product of practical knowledge.[54] This piece of machinery is the Jury. The institution of the Jury, as I shall now show you, has had an even greater influence, both legal and political, than the writ of *Habeas Corpus.*

THE INSTITUTION OF THE JURY

Maitland has shown us that the principle underlying the institution of the Jury is this: "A body of neighbours summoned by some public officer to give upon oath a true answer to some question." [55] It was a procedure which was brought to England by William of Normandy. The Norman dukes found this procedure in force in the provinces which they had conquered from the Carlovingian kings, who had adapted to their own

[54] Bacon, in his letter of advice to Villiers (Spedding, *Letters and Life* vi 33) said very truly, "the people of this kingdom love the laws thereof, and nothing will oblige them more than an assurance of enjoying them; what the Nobles once said upon occasion in Parliament *Nolumus leges Angliae mutare*, is imprinted in the hearts of all the people;" cp. Holdsworth, *H.E.L.* v 435-6.

[55] P. and M. i. 117 (1st Ed.).

uses the procedure of the Roman fiscus.[56] It was thus a royal, a prerogative, procedure. The extent of the power of the crown in conquered England, and the fact that the able Norman and Angevin kings used their powers to construct a central government and a common law, explains why so extensive a use was made of the institution of the Jury in England.[57] The native development of English law explains why it was developed in a manner which was wholly unique. That development has had results so extensive on English law, public and private, and on English life, that it is not going too far to say that there are large parts of English legal and constitutional history, which cannot be rightly understood without some knowledge of the history of the Jury.

I do not, of course, intend to relate that history in detail. What I propose to do is to use its history to show you the extent of its influence. I propose to say something, first, of the Jury of Presentment; secondly of the Trial Jury; and thirdly of the general effects of the Institution of the Jury.

(i) *The jury of presentment.*

The earliest recorded juries were employed to discover and present facts in answer to enquiries addressed to them by royal officials. The jury of presentment is the lineal descendant of these juries. Probably, its

[56] *P.* and *M.* i 120; Thayer, *Evidence* 47-8; Holdsworth, *H.E.L.* i 312-313 (3rd Ed.).

[57] *Ibid.* 313-4.

regular use dates from the Assize of Clarendon (1166).[58] The two chief directions in which this variety of jury exercised an extensive influence have been in the sphere of criminal procedure, and in the sphere of local government.

In the sphere of criminal procedure the jury of presentment has, ever since 1166, been presenting persons whom it suspects of crime. This it can do from its own knowledge: or, if evidence is brought before it by others, it can either indorse these suspicions by presenting a true bill, or it can ignore the bill. Changes in criminal procedure have destroyed much of the usefulness of this safeguard against groundless prosecutions. But historically it was of great importance. The desire of Charles II to convict of high treason Lord Shaftesbury, the ablest leader of the Exclusionist party, was defeated by the Ignoramus of a London Jury.[59] And, in the days when Parliament was unreformed, and there was no active press to advertise the grievances or the fads of all and sundry, the grand jury was useful in calling attention to infringements of the law by officials, and to abuses in the administration of the government. Let us take an instance. At the Exeter assizes in 1639, when the Ship Money question was arousing the indignation of the country, Sir Richard Strode, having had one of his cows distrained for non-payment of the tax,

[58] Holdsworth, *H.E.L.* (3rd Ed.) i 321; for the view that it can be connected with the laws of Ethelred, which Maitland did not favour, see *ibid.* 12 n. 10, 313.

[59] (1681) 8 S.T. 759.

delivered to the grand jury for Devon a paper "in the nature of a presentment." In that paper Magna Carta, and the other mediaeval statutes against taxation without Parliamentary consent, were cited to prove that the distraint was illegal.[60] Finch C. J. represents himself as having scored off Strode; but it would be interesting to hear Strode's account—probably many persons at the assizes sympathized with him. This presentment raised one of the great constitutional questions of the day. But the same machinery was equally useful to call attention to all kinds of abuses—small as well as great; and it was constantly used. "It is the constant universal practice of grand juries," said Holt in 1684,[61] "after they have dispatched the bills that are brought to them in form, they go and consult amongst themselves what they know of their own knowledge, or are informed of concerning any of the matters relating to the business of the county within their charge and authority, and according as upon enquiry they find matter to present, they do present it to the court; and that very often without the strict form, in paper and in English; this is done by them every assizes and sessions." But this practice is, as we shall now see, closely connected with the influence of the grand jury upon local government.

In the Middle Ages, and down to the middle of the seventeenth century, the whole system of local govern-

[60] A letter from Finch, C.J., to Laud, *State Papers Domestic* (1639) 439-441, ccccxxvii 31, 32.

[61] Earl of Macclesfield *v.* Starkey, (1684) 10 *S.T.* at p. 1356.

ment centered in theory round the presentments of juries. By the sixteenth century, indeed, the general eyre had long been obsolete, and the tourns and leets were decadent. But the machinery used by the eyres and tourns and leets had been adopted by the Justices of the Peace in their Quarter Sessions.[62] The sixteenth century books on the Justices of the Peace—the earlier anonymous books and the later books of Fitzherbert, Crompton, and Lambard [63]—show us that the procedure of the Quarter Sessions was the mediaeval procedure, which centered round the charge given by the justices to the jury, and the presentments which the jury made in obedience to that charge. "As in the thirteenth century, when the whole county met to inform the king's justices in eyre of the crimes, negligences, and ignorances of which private persons, officials, and communities were guilty, so in the sixteenth and seventeenth centuries the whole county met the justices of the peace in their sessions, to give them very similar information." [64] This mediaeval ordering of the business of local government was being gradually superseded during the seventeenth century [65]—but it lingered on

[62] Holdsworth, *H.E.L.* iv 135, 142-4.

[63] *Ibid.* 112-119; and for the best and most exhaustive account of this literature see Miss Putnam's book on *Early Treatises on the Practice of Justices of the Peace* (vol. vii of Oxford Studies in Social and Legal History), in which mistakes in earlier books (including my own) are corrected.

[64] Holdsworth, *H.E.L.* iv 142-3.

[65] *Ibid.* 144-5.

into the eighteenth century,[66] and, in some cases, it remained as a more or less meaningless survival at the beginning of the nineteenth century.[67] It was this use of the grand jury which played a great part in implanting amongst Englishmen of all classes that independence in the face of authority, united with a reverence for the law, to which, at the beginning of the eighteenth century, Defoe bore witness in his *True-born Englishman:*

> The meanest English plowman studies law,
> And keeps thereby the magistrates in awe;
> Will boldly tell them what they ought to do,
> And sometimes punish their omissions too.

It is this characteristic which has enabled Englishmen to establish and work constitutional government at home, and to found colonies beyond the seas capable of becoming self-governing Dominions.

We shall now see that these lessons, taught by service in the grand jury, have been further emphasized by the use and development of the trial jury.

(ii) *The trial jury.*

When the jury was first used to try disputed questions of fact, it could be regarded from two very different

[66] Webb, *Local Government, the Parish and the County* 446 seqq.

[67] *Ibid.* 452, 467-8; but the presentments by the justices themselves "upon their own view"—a later adaptation of this machinery of presentment—lasted in full vigor till 1835, *ibid.* 474-479, though by that time it was tending to become a mere formality, *ibid.* 479.

points of view. In the first place, it could be regarded as a new and a rational method of trial introduced by royal justice—an example of that "simpler justice" administered by royal deputies, to which Maine rightly attributed so great an influence on the development of law in modern states.[68] Persons who lived in the neighborhood of the disputed facts were to be summoned to decide them; and in the days when communities were small and isolated, it no doubt appealed to two very strong weaknesses of human nature—the liking to pry into one's neighbor's concerns, and to form and give effect to a judgment upon them. No doubt in these far off days this body of witnesses, set to find the facts, was often an efficient tribunal, which decided the point at issue on reasonable grounds. But, in the second place, at the period when these juries were thus set to find the facts in their neighbor's quarrels, men's ideas of a trial were dominated by the primitive ideas which center round the old processes of ordeal, battle, or compurgation. Disputes, it was thought, should be settled by a quasi-religious process, which depended either on the belief that God would and could work a miracle to protect the right, or on the decisive character of an oath.[69] The primitive jury could be regarded as a mode of proof which had taken the place of these primitive methods of trial. It was the test to which the parties were compelled or agreed to submit their

[68] *Early Law and Custom* 172.

[69] See Holdsworth, *H.E.L.* (3rd Ed.) i 299-312.

case, as in earlier days they were compelled or agreed to submit their case to ordeal, battle, or compurgation. It was largely because it was so regarded by the English judges of the thirteenth and fourteenth centuries, who had cut themselves off from the Roman civil and canon law, with its elaborate rules about witnesses, that the jury was able to develop in England, even as English law developed, on its own lines.[70] If the judges had been men who had absorbed the canonists' law of procedure and evidence, they would probably have treated the jury simply as a body of witnesses; and, in that case, the English jury would, like the French jury, have had no history.[71] But since the judges were ignorant of the canonists' rules of procedure and evidence, and since they had no rules of their own as to parol evidence, they treated the jury as a formal proof, and their verdict as having something of the same inscrutability as the results of the old formal processes. England was thus saved, but saved narrowly, so Maitland thought,[72] from the canonist system of inquisitorial procedure, which led inevitably to a form of trial which was characterized by secrecy and the habitual use of torture.[73] Continental jurists of the latter part of the eighteenth century, who wished to reform their system, advocated the introduction of the English jury. It was pointed

[70] Holdsworth, *H.E.L.* (3rd Ed.) i 316-319.
[71] *Ibid.* 315-16, 318.
[72] *P.* and *M.* (1st Ed.) ii 655.
[73] Holdsworth, *H.E.L.* (3rd Ed.) i 315-6, v 174-5.

to as a model by Beccaria,[74] and it was introduced into France in 1791.[75]

It was only gradually, and by the efforts mainly of the judges, and to some extent of the executive and the Legislature, that this body of neighbors cast off their connection with these old modes of trial, lost their character of witnesses, and became simply judges of the fact under the direction and control of the court.[76] The most critical period in the history of the jury was the close of the Middle Ages. A jury will not work well when the country is divided by personal and political feuds, and when the central government is weak. This was the experience of France in the years following the introduction of the jury.[77] In the England of the Wars of the Roses, waged by over-mighty subjects, who used all their powers to pervert the machinery of government, the jury broke down.[78] One of the most beneficial results of the work of the Council and Star Chamber was to restore its proper working. They secured this directly by punishing corrupt juries, and their corruptors or terrorizers.[79] They secured it indirectly by re-establishing the rule of law.[80] When the Star Chamber fell in 1641, and the Council lost many of the

[74] *Dei Delitti e Delle Pene* § 7.

[75] Esmein, *History of Continental Criminal Procedure* (Continental Legal History Series), 408.

[76] See Holdsworth, *H.E.L.* (3rd Ed.) i 332-47.

[77] Esmein, *op. cit.* 446-53.

[78] Holdsworth, *H.E.L.* (3rd Ed.) i 343, 483-4, ii 415 n. 5.

[79] *Ibid.* i 343-4.

[80] *Ibid.* i 492, 507-8, iv 80.

powers which it had exercised all through the sixteenth and early seventeenth centuries, the development of the jury passed to the judges of the common law courts; and it was by them that it was given its modern form, and assumed its modern relation to the court.[81]

That on the whole it works well in England is the opinion of distinguished lawyers of great experience from all periods in the history of our law.[82] But outside England opinion is by no means so unanimous. It is clear, for instance, that it has not worked wholly satisfactorily in France.[83] This I think is due to the fact that, while it is easy to transplant an institution like the jury, it is not possible to transplant the environment

[81] Holdsworth, *H.E.L.* (3rd Ed.) i 344-7.

[82] Fortescue, Coke, Hale, Blackstone, Stephen; and, with respect to its work in the new county courts, Chalmers.

[83] For controversies as to the usefulness of the jury see Esmein, *op. cit.* 465-499; Esmein believes in it, see *ibid.* 563-4—though admitting that it does not work so well as in England; on the other hand the opinion of Barthélemy, *Le Gouvernement de la France* 196 is more unfavorable—"Le principe du jugement des crimes par le jury apparaît comme un dogme intangible, on serait presque tenté de dire, comme une superstition. En fait, cette institution aboutit souvent aux résultats les plus ahurissants: composé en majorité de petits bourgeois, le jury montre une sévérité souvent extrême pour les attentats aux biens et souvent une indulgence surprenante pour les attentats contre les personnes. Il est inutile de dire qu'il se préoccupe presque toujours des conséquences juridiques de sa déclaration: il en résulte l'impunité pour les crimes dont la pénalité lui apparaît trop forte: crimes dits passionnels, infanticide, incendie volontaire. . . . Dans les procès dits politiques, notamment dans les procès en diffamation, il vaudrait autant, en bien des cas, faire dépendre la justice d'un coup de dés que de la décision du jury."

in which it was developed, and in which it flourishes. Institutions are tender plants, and depend upon a congenial soil and atmosphere. The jury works well in England mainly because the bench is stronger than the bar, so that I think it is true to say that its success is due to the same causes as those to which the development and the success of our system of case law are due.[84] For this reason the jurors have been from the first, and still are, in the habit of looking to the summing up by the judge for guidance, rather than to the orations of counsel.[85] Thus the bench is able to assert its prerogative as the judge of the law, and the jury's prerogative as judge of the fact; and to prevent both from being infringed. "It is," said Lord Cairns,[86] "of the greatest importance in the administration of justice that these separate functions [of judge and jury] should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of

[84] Above 23-25.

[85] Thus Esmein, *op. cit.*, 563, speaking of the French jury says, "The high magistrates who preside over it have never been able, owing to the persistent memory of the inquisitorial procedure, to acquire a real authority over the jury and to assume direction of it efficaciously."

[86] Metropolitan Railway Co. *v.* Jackson (1877) 3 *A.C.* at p. 197.

the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." The jury system will never work well unless this separation of powers is observed.

That the institution of the trial jury, thus developed, and thus controlled, has more than any other single cause determined the form of important branches of our common law is I think obvious to any student of our legal history. Let us take one or two illustrations.

First, it has determined the whole form of our criminal procedure. Even in the fifteenth century, when Fortescue wrote his panegyric on the laws of England, the humanity of the English procedure was in striking contrast with the continental system.[87] The English procedure was accusatory, not inquisitorial. That meant that the procedure was regarded as a litigation between the crown and the accused, which was tried by a judicial process like that used in an ordinary action; and not as an enquiry into the guilt or innocence of an accused person to be conducted by officials.[88] The survival of this idea in England prevented the growth of that secrecy, and those restrictions on the accused's power of defence, which characterized the continental system.[89] The English procedure thus evolved was not perfect; but it was so infinitely better than the con-

[87] *De Laudibus* c. 27.

[88] Holdsworth, *H.E.L.* iii 620-622 (3rd Ed.), iv 176-7.

[89] *Ibid.* v. 174-6.

tinental system [90] that it was praised by Beccaria,[91] and was adopted, so Esmein tells us, "as a model for the legislation of the French Revolution." [92]

Secondly, it has determined the form of that unique system of pleading in civil actions, which was evolved by the common law. The jury was, as we have seen, put into the place of the older modes of proof—battle, ordeal, or compurgation—with as little change as possible;[93] and so, as under the old system of formal proof, the parties were obliged to state their own cases with minute verbal accuracy.[94] Thus we get that feature, which Stephen has told us is the most characteristic feature of the common law system of pleading—the fact that the parties must, by means of their own allegations, come to an issue, and agree that that is the issue upon which the court must decide the dispute.[95] And the existence of the jury determined, not only the manner in which the issue to be decided by the court or jury was reached, but also the general principles underlying the form which the pleadings must take. As the common law became more complex, the number and variety of the pleas available to litigate increased; and, as the jury were a body of rational men, and not a mere mechanical test, it was possible and necessary to put these

[90] *Ibid.* ix 223-226.
[91] *Dei Delitti e Delle Pene* § 7.
[92] *Op. cit.* 323.
[93] Above 81-82.
[94] Holdsworth, *H.E.L.* (3rd Ed.) iii 612, 628.
[95] *Pleading* (5th Ed.) 138.

pleas before them.[96] Moreover it was becoming necessary to mark out the spheres of action of the court and the jury—to distinguish issues of fact from issues of law. It was the need, first, to place the point at issue in an intelligible form before the court and jury, and secondly to distinguish issues of fact and law, which are at the root of the rules that the statements of the parties must be single, certain and material.[97] On these guiding principles, which were necessitated by the presence of the jury, was raised the elaborate superstructure of minute rules, which, to use Maitland's words,[98] made the common law system of pleading "the most exact, if the most occult of the sciences."

Thirdly, the fact that in a common law action issues of fact and law were sharply divided, and the fact that the court was called upon to lay down the law upon facts found by a jury, or upon an issue of law reached by the pleadings of the parties, were causes which made for the successful working of the system of case law. Though that system was adopted by the Chancery in the seventeenth century, it does not work so well in a jurisdiction in which the application of the law often turns upon the conduct and special circumstances of the parties; in a jurisdiction in which issues of law and fact are not so sharply defined. We can

[96] Holdsworth, *H.E.L.* (3rd Ed.) iii 630-1.

[97] *Ibid.* 632-4.

[98] *P.* and *M.* ii 609; for its later mediaeval history see Holdsworth, *H.E.L.* iii 634-653; for its modern history see *ibid.* ix 262-335.

take as illustrations the accumulation of cases which turn solely on the construction of documents, and the manner in which unduly harsh rules were developed as to the conduct of trustees.

Lastly, the existence of the jury has had a decisive effect upon the law of evidence. At Northwestern University, and in the presence of your Dean, who has written the greatest treatise upon the law of Evidence in any English speaking country, I naturally hesitate to dogmatize. But I think that Dean Wigmore's book, and the other great American book on this subject—Thayer's *Preliminary Treatise on Evidence at the Common Law*, establish the fact that the most characteristic rules of the law of evidence—the rules which exclude certain kinds of testimony—are due to the existence of the jury;[99] and that they have been evolved by the judges, partly to prevent the jury from being misled by the testimony produced, and partly to keep them to the issue defined by the pleadings of the parties. Further, I think that both these books establish the fact that the relatively late introduction of the oral testimony of witnesses, was partly due to the fact that the jury long retained their original character of witnesses.[100]

These, then, are some of the specifically legal results of the institution of the trial jury. I pass now to the consideration of the more general effects of the institution of the jury system.

[99] Thayer, *op. cit.*, Introd.

[100] Holdsworth, *H.E.L.* ix 181-5 and references there cited.

(iii) *The general effects of the institution of the jury.*

Three of these general effects, to which I wish to call attention are, first, its use as a safeguard of the rights of citizens; secondly its use in the political education of citizens; and, thirdly, its effects upon the law.

First, right through English history the use of the jury as a safeguard of the rights of citizens has been marked. It was the acquittal of the Seven Bishops by a jury which was the immediate forerunner of the events which brought about the Revolution. In 1794, at a time when the fear inspired by the French Revolution was at its height; at a time when the attorney-general Sir John Scott, the future Lord Eldon, could declare that it was treason to agitate for the establishment of 'representative government,' because that form of government was inconsistent with the existence of a king and a House of Lords,[101] and so was "the direct contrary of the government which is established here";[102] a jury, by acquitting Thomas Hardy, put a stop to these constructive extensions of the law of treason. Professor Trevelyan is probably right when he says of this acquittal that it "saved England from a

[101] "Their principle . . . was that equal active citizenship is the right of all men, and that upon this principle their representation of the people was to be asked for. Now it requires no reasoning to state, that a representation of the people founded upon the principle of equal active citizenship for all men, must form a Parliament in which no King nor Lords could enter," Trial of Thomas Hardy (1794) 24 S.T. at p. 277.

[102] *Ibid.* at p. 294.

course of bloodshed, and perhaps ultimately from a retributive revolution."[103] The form in which, in the eighteenth century, the demand for an increased liberty of the press took in England, was a demand for an extension of the powers of juries in proceedings for libel;[104] and in 1792 the demand was conceded in this form by Fox's Libel Act.[105] Nor should it be thought that this use of the jury in safeguarding the right of citizens is merely a matter of history. The ministers of an absolute democracy may be even more arbitrary and unreasonable than the ministers of an absolute king; and during their tenure of office a jury may in the future, as in the past, be called upon to vindicate the rights of the citizen.

Secondly, of the use of the jury as helping to give a political education to the citizen I have already said something when dealing with the grand jury.[106] Obviously both kinds of jury have in the past helped in this work; and the trial jury still helps. It teaches the members of the jury to cultivate a judicial habit of mind. It helps to create a respect for the law. It reminds them that they owe duties to society. De Tocqueville regarded this educative effect of the jury system as the most valuable of its consequences. "We should regard it," he says,[107] "as a school which gives

[103] *British History in the Nineteenth Century* 71.

[104] Stephen, *History of Criminal Law* ii 321-44, 348-58.

[105] 32 George III c. 60; Stephen, *op. cit.*, ii 344-8, 359-62.

[106] Above 80.

[107] "On doit le considérer comme une école gratuite et toujours ouverte, où chaque juré vient s'instruire de ses droits, où il entre

instruction gratuitously and continuously. Where each juryman can learn his rights, where he mixes day by day with the best educated and most enlightened of the upper classes, where the law is taught to him in the most practical way, and is explained in a manner which he can understand by the efforts of the bar, by the direction of the judge, and even by the passions of the parties."

Thirdly, of the effect of the jury upon the law I may perhaps be allowed to repeat part of what I have said in the first volume of my history of English law:— [108] "The effects of the jury system upon the law are no less remarkable and no less beneficial. It tends to make the law intelligible by keeping it in touch with the common facts of life. The reasons why and the manner in which it thus affects the law are somewhat as follows: If a clever man is left to decide by himself disputed questions of fact he is usually not content simply to decide each case as it arises. He constructs theories for the decision of analogous cases. These theories are discussed, doubted, or developed by other clever men when such cases come before them. The interest is apt to centre, not in the dry task of deciding the case before the court, but rather in the construction of new theories, the reconciliation of con-

en communication journalière avec les membres les plus instruits de les plus éclairés des classes élevées, où les lois lui sont enseignées d'une manière pratique, et sont mis à la portée de son intelligence par les efforts des avocats, les avis du juge, et les passions mêmes des parties," *Democratie en Amérique* ii 190.

[108] Vol. i (3rd Ed.) 349-350.

flicting cases, the demolition or criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation. It is only the philosopher, or possibly the professor of general jurisprudence, who can pursue indefinitely these interesting processes. Rules of law must struggle for existence in the strong air of practical life. Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away. Sooner if, like the criminal law or the commercial law, they touch nearly men's habits and conduct; later if, like the law of real property, they affect a smaller class, and affect them less nearly. The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense. Judges must explain the law to the jury. They must separate the rule of law from the question of fact. This produces both precision in the statement of the rule, and a clear outside judgment on the facts. Bagehot [109] said of the Parliamentary head of a government office, "his function is to bring a representative of outside sense and outside animation in contact with the inside world. No man is a perfect representative of outside sense . . . that many-sided sense finds no microcosm in any single individual." The jury is to the inside technical world of our common law system a representative of that outside sense, and outside animation.

[109] *English Constitution* 201.

I hope that I have made it clear that, without the study of legal history, it is impossible to understand the many characteristics of our common law, of our constitution, and of our habits of political thought, which owe their origin to the evolution of these two important pieces of legal machinery — the writ of *Habeas Corpus* and the institution of the Jury. I shall now show you that their history, as well as the history of the sources of our law which I sketched in my last lecture, throw much light on another very important matter—the attitude of the common law and the common lawyers to legal and political theory.

THE COMMON LAW AND LEGAL AND POLITICAL THEORY

Two tendencies can be observed throughout English legal and constitutional history. On the one hand, the development of the common law has never been very directly or deeply affected by the speculations of legal and political theorists. On the other hand, the common lawyers, helped by their system of case law, have always kept sufficiently in touch with changing needs and circumstances, and with the main currents of public opinion, to adapt the machinery of the law and its rules to suit new needs and circumstances. In this way the common law has been indirectly affected by legal and political speculation, because, in so far as this speculation has helped to form public opinion and to suggest necessary changes, the common law has been obliged to take some account of it. The history of

the writ of *Habeas Corpus* and the institution of the Jury are good illustrations of the working of these tendencies, which have had much influence on the development of our common law.

In the twelfth and thirteenth centuries there is no doubt that English law was greatly affected by the continental renaissance of the study of the Roman civil law, and by the growth of the canon law. But for these intellectual influences it is difficult to see how a common law could have been created. But their influence was not overwhelming. "In England," says Maitland,[110] "the new learning found a small, homogeneous, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma." The history of trial jury illustrates the manner in which old ideas modified a new institution;[111] and the history both of the jury of presentment and of the mediaeval Parliaments illustrates the manner in which the common lawyers helped to develop mediaeval ideas and institutions, in such a way that they gave England a machinery of local and central government, which was quite unique.[112]

The sixteenth century—the age of transition from mediaeval to modern—which produced much legal and political speculation on the continent, produced com-

[110] *P.* and *M.* i 24 (2nd Ed.).

[111] Above 83-84.

[112] For the jury of presentment see above 78-80; for the influence of the lawyers on the development of the mediaeval Parliament see Holdsworth, *H.E.L.* (3rd Ed.) ii 430-4.

paratively little speculation in England, and no book of outstanding importance on the theory of the modern state. This phenomenon is largely due to the fact that the Tudor sovereigns, helped by the courts and the Legislature, had been successful in peacefully adapting the laws and institutions of England to the new conditions. Fundamental principles were taken for granted, or discussed in a very perfunctory fashion. What discussion there was, centered mainly round proposals to reform particular institutions.[113] The constitutional controversies of the Stuart period introduced England to some of the continental theories—theories of the divine right of kings, theories of natural rights, theories of the contractual origin of the state. But even in this century of legal and political speculation, the main stress was laid, both by the royalist and the Parliamentary party, upon legal precedents drawn from all periods of English history, and upon arguments based on those precedents. The solution was worked out by lawyers in sympathy with Parliament, by means of a series of deductions from those precedents, rather than by the help of *a priori* theories, which deduced from a supposed origin of the state in an original contract or otherwise, the correct balance of power within it; and, with the minimum of change, they adapted their law and their legal machinery to the new political situation.[114]

[113] Holdsworth, *H.E.L.* iv 214-215.

[114] *Ibid.* vi 274-5; as Maitland said, *English Law and the Renaissance* 30, if in England there had been a reception of

We can see the same phenomenon at the end of the eighteenth and the beginning of the nineteenth centuries.

During the first three-quarters of the eighteenth century the Whig theory of government, which had triumphed at the Revolution, was the accepted theory. The ideals of the Whig party—the freedom of the individual from arbitrary interferences with person and property, the supremacy of the law, religious toleration, the view that the well-being of the subject should be the aim of government—were to a large extent realized. This is the explanation of that veneration for the English constitution and law, which found its best literary expression in Blackstone's Commentaries. In thus expressing this veneration Blackstone was only following the dominant opinion of his day—the opinion not only of English, but also of continental thinkers. "Blackstone," says Dicey,[115] "just because he was a Revolution Whig, saw in England, as did many of the wisest men of his generation, such as Montesquieu, Voltaire, Chatham, and Burke, the one great free state where arbitrary government was unknown, and individual freedom of speech and action was protected by the rule of fixed law." It was therefore natural that Blackstone

Roman law comparable to that which took place in many continental countries, "in the seventeenth century there might have been a struggle between king and parliament, but it would hardly have been that struggle for the mediæval, the Lancastrian, constitution in which Coke and Selden and Prynne and other ardent searchers of mouldering records won their right to be known to school boys."

[115] *National Review* liv 659.

and the other lawyers of his day should think that no further or other political or legal theory was needed, than that which could be deduced from a study of the rules of English law public and private; and that all that was needed in the way of reform were a few minor changes to meet obvious inconveniences. Blackstone was not, as is sometimes supposed an enemy to all reform.[116] In fact, in one very important matter—the matter of legal education—he was the pioneer of reform.[117] But, when all allowances have been made, it is true to say that he and the other lawyers and statesmen of his day were satisfied that, in all essentials, the law and constitution of England needed no change. They would all have subscribed to Burke's famous panegyric on the English constitution—"We ought to understand it according to our measure, and to venerate

[116] In his introductory lecture on the Study of the Law (*Comm.* i 30) he said that one of the advantages which might be expected from the academical study of the law was the suggestion of expedients "for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system;" he admitted that the clashing jurisdiction of the courts of law and equity were a great "solecism," *Comm.* iii 441; at the latter part of his life he actively interested himself in schemes of prison reform; his approval of the use of the general issue as a device which mitigated the hardships of the system of special pleading (*Comm.* iii 305-6) was far more enlightened than the views of the Commissioners of 1830, see Holdsworth, *H.E.L.* ix 322-27; he recommended that the common law rules as to the inheritance of relatives by the half blood should be altered, *Comm.* ii 233.

[117] Dicey, *National Review* liv 667-75; Holdsworth, *Sources and Literature of English Law* 159-61; and L.Q.R. xxxix 23-8.

when we are not able presently to comprehend";[118] and they were confirmed in their belief, that the study of the principles and rules of their own system would supply them with all the legal and political theory that they wanted, by Montesquieu's dicta that laws "ought to be so closely adapted to the people for which they are made, that it is very improbable that the laws of one nation can ever be suited to the wants of another nation"; and that "the laws must harmonize with the nature and the principle of government which has been established or which it is desired to establish, whether they serve to constitute it, as do political laws, or to support it as do civil laws." [119]

Burke, in his great speech on Conciliation with America in 1775,[120] gave an explanation of this mental attitude which was as historically and philosophically true as it was eloquent: "It is a great mistake to imagine that mankind follow up practically any speculative principle, either of government or of freedom, as far as it will go in argument and logical illation. We Englishmen stop very short of the principles upon which we support any given part of our constitution; or even the whole of it together. . . . This is nothing but what is

[118] "Appeal from the New to the Old Whigs," *Works* (Bohn's Ed.) iii 114; as Leslie Stephen says, *The English Utilitarians* i 132-3, "Englishmen were concerned rather with details than with first principles. Satisfied, in a general way, with their constitution, they did not want to be bothered with Theories."

[119] *De l'Esprit des Lois* Bk. I c. 3. The translation is taken from Mr. Montague's edition of Bentham's *Fragment on Government* 24.

[120] *Works* (Bohn's Ed.) i 500-501.

natural and proper. All government, indeed every human benefit and enjoyment, every virtue, and every prudent act is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights that we may enjoy others; and we choose rather to be happy citizens than subtle disputants. . . . Man acts from adequate motives relative to his interest; and not on metaphysical speculations. Aristotle, the great master of reasoning, cautions us, and with great weight and propriety, against this species of delusive geometrical accuracy in moral arguments, as the most fallacious of all sophistry."

In Blackstone and Burke we can see, a little exaggerated, the historic attitude of the common lawyers to legal and political speculation; and the adoption of this attitude has played no small part in the accomplishment of the great work of building up the English constitution and the common law. But it was an attitude better suited to a static or slowly developing society, than to the great era of change, which opened at the end of the eighteenth century. Reform of the law was needed on a scale undreamt of at any earlier period in English history, save only in the revolutionary period of the Commonwealth; and new principles were needed to shape these reforms. All classes, except an insignificant minority, hated the French theories of innate natural rights. They judged them by the Reign of Terror which they saw in progress on the other side of the Channel. What then should be the principle upon which these much needed reforms should be undertaken?

Bentham supplied the principle and worked it out in detail. He and his school mobilized the principle of utility in the cause of law reform; and they were the first to emphasize and to use Hobbes's theory of sovereignty,[121] for the purpose of effecting those reforms which the principle of utility demanded. It is no wonder that the attitude of mind which Blackstone recommended was anathema to Bentham and his disciples. From the year 1776, when he published, in his *Fragment on Government,* the attack on Blackstone which made his name,[122] till his death in 1832, Bentham was

[121] For the doctrine of sovereignty see below 117-119, 124-131; Bentham, of course, relied on a sovereign Legislation to effect his reforms, see his *Constitutional Code* Bk. I c. xv §§ 2 and 3, *Works* (Ed. Bowring) ix 96; but he was interested rather in the substance of these reforms than in the theory of sovereignty, and he was not a student of Hobbes, Leslie Stephen, *English Utilitarians* i 302; G. H. Lewes says that James Mill was "the first person who saw Hobbes's prodigious importance as a political thinker," *Biographical History of Philosophy* 439.

[122] Dicey, *National Review* liv 657, says, "it is the most trenchant critique ever penned by a youthful pupil on the doctrines of a celebrated teacher whose dogmas were accepted by the learned world as profound truths. The *Fragment,* which was merely a small part of an intended *Comment on the Commentaries,* is open to criticism, but it was an attack which achieved complete success. It proved once for all that Blackstone had met with a controversialist of immense dialectical power, and that the commentator, though a distinguished lawyer and a great man of letters, was a lax thinker. The *Fragment,* published anonymously, startled the learned world. Dr. Johnson, it is said, attributed it to Dunning. Lord Mansfield, with all his appreciation of Blackstone's literary skill, is reported to have enjoyed the assault on Blackstone's reasoning. Among men of thought Blackstone's reputation as a profound jurist never recovered the

the advocate of the reform of the English constitution and English law by the application of the principle of utility to all its branches, and the enemy of that gradual process of adapting institutions piecemeal to new needs, which the common lawyers had always favored.

Bentham and his school did great things for the reform of English law; and even now, when his theory of utility, as he expounded it, has ceased to inspire the enthusiasm which it inspired in the earlier half of the nineteenth century, his influence still lives. It still lives in spite of all those changes in public opinion which Dicey has so skilfully portrayed, for two reasons. In the first place his principle of utility is valuable because it provides a test of the soundness of proposals for legislation, "which involves a recognition of the rights of every citizen and the recognition of a solid practical aim in legislation." [123] In the second place the use which Bentham and his school made of that principle "expelled mysticism from the philosophy of law, and set the example of viewing laws in a practical light, as means to certain definite and precise ends." [124] For these reasons, as Dicey has pointed out,[125] the Benthamites "forged the arms most needed by the social-

blow struck at him by the *Fragment on Government;*" as Pollock has pointed out, *Essays in the Law* 101, Bentham was not only attacking Blackstone, but also, through Blackstone, Locke's theory of the state.

[123] Montague, *Bentham's Fragment on Government* 43.

[124] Mill, Essay on Bentham, *Dissertations and Discussions* i 373.

[125] *Law and Opinion* (1st Ed.) 309.

ists," and gave them "a legislative doctrine, a legislative instrument, and a legislative tendency preeminently suited for the carrying out of socialistic experiments." Thus both in this century and the last Bentham and his school have had, as Maine pointed out,[126] an influence on English law comparable to the influence of the theory of the *jus naturale* on Roman law. But great as their influence has been, it has not displaced the traditional attitude of the common lawyers to philosophies of law. Though the lawyers, under the influence of Bentham's teaching, came to be ready to make those reforms which the principle of utility demanded, they made them, not by sweeping away the past, but by a careful reconstruction. The series of Commissions on the courts, the law of real property, the criminal law, and many other branches of law, all began by a clear statement of the existing law and its defects, and all recommended only those changes which were needed to cure these defects. Thus the continuity of English law was preserved, and full play was given to that genius for the practical adaptation of old rules to new needs, which, from the earliest period, has distinguished English lawyers.

The history of the sources of English law, which I related in my last lecture, and the history of the adaptation of the writ of *Habeas Corpus* and the institution of the Jury, which I have related in this lecture, are good illustrations of this capacity, which has been present from the earliest times, and has been very conspic-

[126] *Ancient Law* 79.

uous in a century of law reform. It is true that Blackstone's theories as to the excellencies of the English constitution and English law were influenced by the almost universal admiration which that constitution and law then excited; and he often gives an exaggerated expression to this feeling.[127] But, for all that, his method of approach was the traditional method of approach of English lawyers—the historical method of sympathetic exposition, and the suggestion of piecemeal reforms, which practice showed to be necessary. And so it has happened that Blackstone's Commentaries have outlived the speculations of utilitarian law reformers and analytical jurists.

Philosophical speculation about law and politics is an attractive pursuit. More especially is it attractive to the young. A small knowledge of the rules of law, a sympathy with hardships which have been observed, and a little ingenuity, are sufficient to make a very pretty theory. And even for those who are older and more learned, there is a very real fascination in the construction of theories, which will resolve the problems of legal history in a new way, or suggest a new solution of present day problems of law and politics. It is a harder task to become a master of Anglo-American law, by using the history of that law to discover the principles which underlie its rules, and to elucidate the manner in which these principles have been devel-

[127] Many instances could be given; perhaps the best is his panegyric on the benefit of clergy, *Comm.* iv 371; for other instances see Dicey, *National Review* liv 659.

oped and adapted to meet the infinite complexities of life in different ages. But those who have chosen to endure this harder task have chosen the better part. They are brought into close touch with the great lawyers and statesmen of the past, with their difficulties both technical and political, and with the manner in which they have used their knowledge of the rules of law, and of the conflicting needs and beliefs and aspirations of their day, to adapt the law and institutions of the state to new conditions. These students of our law will thus learn, even though it is only at second hand, something of the practical wisdom which comes from knowledge of affairs. They will, for that reason, be able to suggest solutions of present problems which will depend not merely on their own unaided genius, but on the accumulated wisdom of the past; for, as Hale said,[128] "it is most certain that time and long experience is much more ingenious, subtle and judicious, than all the wisest and acutest wits in the world coexisting can be." But, being students of modern law, and cognizant of modern conditions, they will not overlook the modern theories of legal and political philosophers. Helped by history, they will be able to apply to them a critical intelligence which can discriminate between the possible and the impossible, and a capacity to convert what is valuable in them to the development and the adaptation of the law to the needs of their own day.

[128] Considerations touching the Amendment or Alteration of Lawes, *Harg. Law Tracts* 254.

In this lecture and the last I have given some illustrations of the manner in which common lawyers, of all periods of our legal history, have in this way made their common law fit to bear rule in a constantly changing intellectual, social, and political environment. In my next lecture I shall deal with this subject more fully. Taking the two ideas of Sovereignty, and of the Incorporate Person and Unincorporate Groups, I shall explain the manner in which English lawyers fitted these ideas, when they were new ideas, into the structure of English law.

III. THE RULE OF LAW

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English lawyers are not, and never have been, ready to receive and use as the basis of their reasoning the theories of legal and political philosophers. This habit of mind will excite praise or blame according to our own intellectual prepossessions. A great practical lawyer, like the late Lord Lindley, will be apt to resent the introduction of "metaphysical subtleties which are needless and fallacious." [1] A lawyer, like Maitland, who is not only a great lawyer, but also a first rate legal historian and philosopher, will not wholly condemn, but will be more critical of the attitude of the practising lawyer. Of our law he once said,[2] "it has sound instincts, and muddles along with semi-personality and demi-semi-personality towards convenient conclusions." In point of fact, as he almost admits, the attitude of our common lawyers has more reason than is sometimes admitted by legal and political theorists—its instincts are sound, and its conclusions are generally, though, as we shall see, not invariably, convenient.

This phenomenon is, I think, due to two main causes.

[1] "To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious," Citizen Life Assurance Company *v.* Brown [1904] A.C. at p. 426.

[2] *Collected Papers* iii 319.

In the first place, the facts of life, with which our system of case law brings our common lawyers into close contact, are infinitely complex. No one theory will fit them all; and so our common lawyers have been content to go from precedent to precedent, and to build up gradually rules to fit each case, with the result that they have used a mixture of logic, of experience, and of legal and political theory, to evolve their principles. Hardly ever have they allowed themselves to become so enslaved to logic and theory, that they have evolved rules which are wholly out of harmony with the illogical and haphazard facts of daily life. Bagehot once said that "there is a play in unconscious creation which no voluntary elaboration and preconceived fitting of distinct ideas can ever hope to produce." [3] No better illustration of this truth could be found than the history of the manner in which our common law has been built up; and this history goes far to explain the mental attitude of our common lawyers to legal and political speculation. In the second place, our common law, in the course of its long and continuous history, has passed through many periods of crisis and unrest and transition. The sixteenth century—the period of the Renaissance and Reformation, when the transition from the mediaeval to the modern state took place; the seventeenth century—the period when the constitutional controversy between king and Parliament was fought out; the eighteenth and nineteenth centuries—the period of the industrial revolution, of the democratic ideas propa-

[3] *Literary Studies* ii 182.

gated by the French Revolution, of the ideas propagated by Bentham and his school; and the period since the Great War in which we are now living. All such periods are fertile in new political and legal theories;[4] and, since many of these theories have but an ephemeral interest, they can be disregarded by those whose main business is with the practical task of administering justice day by day. But some of these theories have not been ephemeral. They have provided an illuminating generalization of new facts, which has been generally accepted; and they have therefore shaped the public opinion of the new age, and made those accepted commonplaces, which, as Maitland has said[5] "are powerful agents in moulding a constitution." Because they have had this effect they have become a force with which law and the lawyers must reckon. They have opened up new points of view to which old rules and principles must be adapted. The lawyers have made adjustments in the light of these new theories; but, as these adjustments have always been made with an eye to the technical requirements of an old system of law, and to the complex facts of life, the result sometimes appears

[4] As Pollock has pointed out, *Essays in the Law* 103, "at the date of Hobbes's birth (1588) experiments had been made by reforming and anti-reforming publicists with almost every possible speculative combination"; and, as Maitland says (*Collected Works* i 2) "the great demand for political theory [in the seventeenth century] produced a somewhat injurious effect on the supply."

[5] *Collected Papers* i 5.

strange to political and legal philosophers who are more familiar with logic than with law or life.

Theories which have thus affected the development of our common law, and have in turn been modified by the manner in which they have been applied by our common lawyers, are (1) the theory of the sovereignty of the ruler or rulers of the territorial state; and (2) the theories which have been called into existence by the problems to which the recognition of the incorporate person, and the existence of unincorporate groups of persons, have given rise. At first sight these two topics seem to be far apart. But I shall hope to show you that both in times past and today they are closely connected.

SOVEREIGNTY

In the Middle Ages the territorial state, and therefore the theory of its sovereignty, had not emerged. "In all centuries of the Middle Age," says Gierke, "Christendom, which in destiny is identical with Mankind, is set before us as a single universal Community, founded and governed by God himself." [6] It is a Holy Roman Empire—a single community governed by God's agents —the Pope for matters spiritual, and the Emperor for matters temporal. It might seem at first sight that this theory was very remote from the actual social and political facts of the day; that the loosely compacted feudal societies of which Europe consisted, assorted ill with

[6] Gierke, *Political Theories of the Middle Age* (Maitland's Tr.) 10.

these grandiose theories. But in reality the reconciliation was not so difficult as it might appear. The feudal theory required a culminating point and center to complete it. Such a point was found in the theoretically world-wide dominion of the emperor; and thus in the feudal relations of tenure, with their manifold complications and wide application to all classes of society from emperor to king or prince, and from prince to peasant, were found a means whereby both the actual facts of the time could be made to fit into the framework of the Holy Roman Empire, and the actual relations of rulers of many different kinds to subjects, and of subjects to subjects, could be expressed.

On its temporal side this dominant political theory of the Middle Ages had never really corresponded with fact; and, as the territorial state emerged, it grew more and more notoriously untrue. The books of mediaeval lawyers, like Beaumanoir and Bracton, show us that the legal renaissance of the thirteenth century had tended to give the king a position higher than that of a mere feudal lord;[7] and this tendency had been continued and emphasized by the lawyers of the fourteenth century. As the theory of the Holy Roman Empire became more and more obviously unreal, there was a tendency to put the king *qua* his own dominions, into the place formerly occupied by the emperor. Bartolus, Baldus, and other

[7] Esmein, *Histoire du droit Français* 385, 537-538; Holdsworth, *H.E.L.* (3rd Ed.) i 87, ii 253, iii 463-9.

lawyers taught that a state which recognized no superior was an *imperium*.[8] That is why in the fourteenth century the kings both of France [9] and England [10] claimed expressly to be emperors in their realms. But, during the Middle Ages, these developments did not result in the development of our modern theory of the sovereignty of the territorial state.[11] This was due to two causes. In the first place, over-mighty subjects in England, France, and other countries prevented these theories as to royal power from having their full effect. It was not till this turbulence had been mastered, it was not till new centralized governments, which could make their influence felt throughout the kingdom, had been established,[12] that kings were in a position to reduce theory to practice. In the second place, till the Reformation, the theory which made the pope the independent head of the church, maintained in each state an *imperium in imperio*. Church's law was outside the sphere of State's law, so that the state had no control over the large field

[8] Gierke, *op. cit.*, 97; Woolf, *Bartolus of Sasso-Ferrato* 380.

[9] Esmein, *op. cit.* 384 n. 2, citing Boutillier, *Somme Rurale* II tit I p. 646; Brissaud, *Histoire du droit Français* 771 n. 1.

[10] Gierke, *op. cit.* xlv n. 4; preamble to Henry VIII's statute of Appeals, 24 Henry VIII c. 12; Holdsworth, *H.E.L.* (3rd Ed.) i 581 n. 4.

[11] "We may see in theory the new edifice of the Modern State being roofed and tiled when in the world of fact just the first courses of this new edifice are beginning to arise amidst the ruins of the old," Gierke, *op. cit.*, 96.

[12] For the history of this process in France see Holdsworth, *H.E.L.* iv 56-9.

of jurisdiction which belonged to the church.[13] Therefore the subjects of the state, in their capacity of churchmen, were obliged to admit that there were a large range of subjects over which the state and the state's law had no control.[14] Sir Thomas More suffered death rather than renounce his assured belief that the supremacy of the pope over the national church could not be taken away by Act of Parliament.[15]

This illustration shows us why it was that the Refor-

[13] "Imprimis sicut dominus papa in spiritualibus super omnibus habeat ordinariam jurisdictionem, ita habet rex in regno ordinariam in temporalibus, et pares non habet neque superiores; et sunt qui sub eis ordinariam habent in multis, sed non ita meram sicut papa vel rex," Bracton f. 412; see also *ibid.* f. 5b; cp. Holdsworth, *H.E.L.* (3rd Ed.) i 586 n. 5.

[14] "This comes out clearly in the additions to the second Dialogue of the Doctor and Student printed in the 1531 edition. The Student magnifies the power of Parliament, but even he admits that it has its limits; thus in cap 11 he says that, as it is part both of the common law and of the law of God that priests may not serve on juries, "therefore I think that the Parliament may not enact that priests should go universally upon inquests:" and in cap 10 he denies the force of a statute which attempted to make a rule as to marriage contrary to the canon law. The recognised mediaeval point of view is that of the Doctor who says (cap 1) "I suppose that the Parliament hath no power to these things, for they be annexed to the right spiritual, whereof the temporal jurisdiction hath no power: for the inferior may not judge of the superior;" see H. J. Randall, *Wigmore Celebration Legal Essays* 300-302.

[15] "For as much as this indictment is grounded upon an Act of Parliament, directly oppugnant to the laws of God and his holy church, the supreme government of which or any part thereof may no temporal prince presume by any law to take upon him . . . it is therefore in law among Christian men insufficient to charge any Christian," Roper, *Life of More.*

mation created the new intellectual conditions necessary for the rise of the modern theory of the sovereignty of the territorial state. The Protestant prince claimed to be the lord both of church and state. Melancthon held that he must uproot false doctrines, and propagate true doctrines. He must have regard not only to the lives and property of his subjects, but also to their eternal welfare. Property of the church which is being misused he must apply to righteous uses.[16] It is easy to see that a Catholic prince could not be expected to content himself with an inferior position. In France the state obtained by treaty with the pope large rights over the church.[17] In Spain the state established its supremacy so completely that it was able to use the ecclesiastical machinery of the Inquisition to further its ends.[18] At the same time in France a new machinery of local and central government, which put all power into the hands of the king and his Council, and a bureaucracy dependent on them, was being gradually established;[19] and this French organization of government was imitated by the princely houses in Germany, and in many other continental countries.[20] Mediaeval ideas as to the supremacy of law disappeared, as the courts fell

[16] De Officio Principum quod mandatum Dei praecipiat eis tollere abusus Ecclesiasticos; cp. H. Lureau, *Les doctrines democratiques de la seconde moitié de XVI^e siècle* 22-5 for similar views held by Luther and Calvin; Figgis, *From Gerson to Grotius* 64-74.

[17] Esmein, *op. cit.*, 713-17; Figgis, *Divine Right of Kings* 109-10.

[18] Ranke, *Turkish and Spanish Monarchies* (Kelly's tr.) 62.

[19] Holdsworth, *H.E.L.* iv 56-59.

[20] See *ibid.* 55 n. 2.

under control of the king, and as the mediaeval representative assemblies disappeared.[21] The facts were prepared and the time was ripe. The first political philosopher who could generalize from them could hardly fail to enunciate a theory of the sovereignty of the territorial state.

This theory was for the first time clearly stated in Bodin's six books on the Republic. These six books contain a great deal more than a new theory of the state. They are a treatise quite as much upon comparative constitutional law and public administration, as upon political science.[22] But the claim of Bodin's treatise to be a classical book rests upon the fact that it stated clearly for the first time this new theory of the sovereignty of the state. According to this new theory, the sovereignty of its ruler is the essence of the state.[23] The existence or non-existence of a sovereign ruler supplies the test which distinguishes the state from other associations;[24] and according to whether the sovereign ruler is one or few or many, states can be classified.[25]

[21] *Ibid.* 166-172.

[22] Bodin's book, says Janet, *Histoire de la science politique* ii 114, "ne peut être comparée, pour l'étendue du sujet et la richesse des materiaux, qu'à la politique d'Aristote ou à l'Esprit des lois."

[23] Bodin in his first sentence defines the Republic as, "Un droit gouvernment de plusieurs mesnages, et de ce qui leur est commun, avec puissane souveraine."

[24] Bk. i c. ii 9. "La Rèpublique sans puissance souveraine qui unist tous les membres et parties d'icelles, et tous les mesnages, et colleges en un corps, n'est plus Rèpublique;" cp. Bk. iii c. vii 347.

[25] Bk. vi c. iv 713.

But though sovereignty could be vested in one or few or many, the attributes of sovereignty could be more clearly grasped when it was vested in a single person;[26] and Bodin regards this as the most perfect form of government.[27] In fact he, in common with many other statesmen of the sixteenth century, could hardly fail to prefer it, because it seemed to be the one form of government which was able to keep the peace, and to guide the state through the perils of this age of change.[28]

During the seventeenth and eighteenth centuries, sovereignty was in the hands of a monarch in most of the European states. And thus, though the theory of sovereignty in no wise involves monarchical government, it came to be associated with it; and, as we shall see,[29] this fact helped to mislead some of our English lawyers and political writers. This identification of the theory of sovereignty with monarchical government was corrected by the French Revolution. It is true that the rights of man had been emphasized by Locke and Rousseau, and by the American constitution. But, as Professor Duguit has said, the Constitutional Assembly was strongly influenced by the old monarchical tradition.

[26] "Only under the form of monarchy does the notion of sovereignty readily lend itself to popular exposition," Figgis, *Divine Right of Kings*, 91.

[27] Bk. vi c. iv 737.

[28] Cp. Figgis, *Camb. Mod. Hist.* iii 748, "He (Bodin) typified and helped to create that alliance between the Kings and the theorists of sovereignty which formed part of the strength of monarchy."

[29] Below 127-130.

"It was fortunately discovered that by a simple verbal change the monarchical theory of sovereignty could be easily reconciled with the teaching of the philosophers and the principles of the American Constitution. All that was necessary was to substitute the nation for the king. The king was a person a subject of right, the holder of sovereign power; like him, the nation will be a person, a subject of right, the holder of sovereign power. The sovereignty of the king was one and indivisible, inalienable and imprescriptible; nor will national sovereignty be here different. The Declaration of Rights and the Constitution of 1791 say categorically that 'the source of all sovereignty resides fundamentally in the nation . . . Sovereignty is one and indivisible, inalienable and imprescriptible. It belongs to the nation.' " [30]

Thus the theory of sovereignty was taken over by the modern democratic state. But, from the first, the theory of sovereignty had assorted ill with the idea, inherited from mediaeval political thought, that subjects have certain overriding natural or moral rights. Under the *ancien régime,* however, when the state was identified with a monarchical sovereign, and law with that sovereign's command, this idea could be disregarded. It was not so easy to disregard those rights of man which, no less than sovereignty, were sanctioned by the

[30] *Law in the Modern State* (Tr. by Laski) 11. Professor Borchard 36 Yale Law Journal at pp. 38-41 has shown that it is substantially upon this reasoning that governmental exemption from liability in tort is rested in the United States.

Declaration of Rights and the Constitution of 1791. Thus the theory of sovereignty, when applied to the new democratic state, ceased to be so logically complete as when it was applied in a monarchical state. It is not therefore surprising to find that, as the democratic state develops new aims and new ideals, more stress comes to be laid upon elaborating and increasing the content of these rights of man, and less on the sovereignty of the state. Hence some modern writers have begun to deny, or at any rate to minimize, the sovereignty of the state; and to advocate a new organization of society which will, in the opinion of these writers, give fuller effect to the enlarged list of rights, which they consider it to be the main object of the state to guarantee.[31] But we cannot profitably consider these modern speculations, till we have examined the manner in which this theory of the sovereignty of the territorial state was received in England, and applied by English lawyers and statesmen and political thinkers. We shall see that, just as the English political theory of the eighteenth century supplied a necessary corrective to the extreme consequences of the theory of sovereignty as then understood and applied in monarchical states, so English theory and practice supplies a necessary corrective to the modern democratic theories, which would have us believe that the theory of sovereignty is worn out, and should be discarded.

In England as in France the idea that the king was superior to any ordinary feudal lord had been, from the

[31] Below 133-135.

thirteenth century onwards, present to the minds of English lawyers. In both countries the progress of this idea had been checked by the recrudescence of feudal turbulence in the fourteenth and fifteenth centuries. But in the sixteenth century, both in England and abroad, it had begun to develop with the development of the independent territorial state, and with the definite subordination of the church to the state. The king of England, like his continental brethren, became the leader, the representative, the embodiment of the state; and, from the reign of Henry VIII, he had been the supreme head under God of the church. The state, to which the church was now subordinate, had necessarily taken upon itself the character of a divine institution; and the king as its head could therefore lay claim to a divine appointment. These developments of the kingly office are found both in England and abroad. But at this point the parallel between the English and the continental development ceases. The English king was the representative of the state, his prerogative was the source of the executive authority in the state, and he and his Council had large judicial powers; but he was not the sole source of all authority. The state was conceived, not as centering in him alone, but as consisting of a body politic composed of himself as head, and the three estates of his realm as members.[32]

[32] Fourth Instit. 2, "the king and these three estates are the great corporation or body politick of the kingdom;" see Y. B. 14 Hy. VIII Mich pl 2 p. 3, and Willion *v.* Berkeley (1561) Plowden at p. 234, for similar statements.

The English king therefore was far from being the sovereign power in the state. Nor do I think that any lawyer or statesman of the Tudor period could have given an answer to the question as to the whereabouts of the sovereign power in the English state. The doctrine of sovereignty was a new doctrine in the sixteenth century; nor is it readily grasped until the existence of a conflict between several competitors for political power makes it necessary to decide which of these various competitors can in the last resort enforce its will. There is a negative element about the doctrine of sovereignty as well as a positive. We must be able to assert not only that the sovereign is the person or body to whom the bulk of his subjects are in a state of habitual obedience, but also that he or they are not in a state of habitual obedience to any; and it is not until this conflict has arisen, and has been decided, that men see the necessity for the denial as well as the assertion. For it is not until then that men are driven to consider, either the precise extent of the power of the ruler of the state, or the question whether or no it is shared by any other person or body within the state. Till then general assertions as to the supremacy of some particular person or body of persons will serve. It is such a general assertion of the supremacy of the king in Parliament that we get in Sir Thomas Smith's book. No controversy had as yet arisen as to the extent of the powers of the king or the powers of Parliament. Smith does not contemplate the existence of a controversy between them. All that he means to do is to assert that

the king together with his Parliament can exercise supreme authority in the state.[33]

It was not only the existence of Parliament, and the prevailing idea as to the supremacy of the law, which prevented English lawyers from accepting the continental theory of sovereignty. That theory was equally difficult to square with the existing system of local government. England was ruled, not by a set of officials dependent on the king and his Council, but by a set of unpaid justices of the peace, who ruled their shires by the mediaeval judicial machinery. They were controlled no doubt by the Council and by the law. But both these forms of control left them a far wider discretion than was left to the paid delegates of an absolute government. They were mediaeval officials, who were closely connected with the mediaeval communities of hundred and shire; and they had behind them the traditions of the time when these communities were self-governing units.[34]

During the Tudor period the majority of the nation was satisfied with the balanced Tudor polity, which left large and undefined powers to king and Council, to Parliament, to the law, and to the officials of the local government. The accession of James I changed all this. In the first place, the question of the relation

[33] For Smith's book and its relation to the theory of sovereignty see Pollock, *History of the Science of Politics* (Ed. 1911) 57; Alston's Ed. of Smith's *Republic* xxix-xxxiv; Holdsworth, *H.E.L.* iv 208 n. 2.

[34] See Holdsworth, *H.E.L.* iv 163-5.

of the prerogative to Parliament and to the courts was over-ripe for solution. Respect for the old queen had caused many fiscal and political questions to be shelved, the stirring of which must raise this question, and probably also the general question of the whereabouts of the sovereign power in the state. In the second place, the king was prepared to solve all such questions by the application of his own political theories. He held that the king was the supreme ruler and supreme judge; that he was above the law, which he could make, mitigate, or suspend; and that he was answerable for his acts to God alone.[35] If this theory had prevailed England would have accepted the theory of sovereignty in its continental form; and her government would have conformed to the continental type. In self-defence Parliament was obliged to evolve for itself a rival theory of sovereignty. It was propounded for the first time by James Whitelocke in the debate on Impositions in 1610.[36] It turned upon the distinction between the king in Parliament and the king out of Parliament. Of these two powers the power of the king in Parliament was the greater, and could control the other.

[35] These ideas were propounded in the *Basilikon Doron*, and the *Trew Law of free Monarchies*, which were published in 1598; Figgis, *Divine Right of Kings* 136, says that in the latter work "is to be found the doctrine of divine right complete in every detail."

[36] 2 State Trials 480; Prothero, *Documents* 351-2; *Parliamentary Debates in 1610* (C.S.) 103-9; the report in the State Trials erroneously assigns the speech to Yelverton; cp. Holdsworth, *H.E.L.* vi 84-6.

Therefore it was the sovereign power. This theory is essentially a lawyer's theory stated in a legal way. The objection which a royalist might fairly make to it was that, in effect, it left the state with no sovereign at all, unless king and Parliament were in agreement; and that a theory of sovereignty was useless unless it provided for the case of a disagreement. The royalist theory, he would have said, was infinitely superior because it provided for the case of a disagreement. In such a case the king had the last word. On the other hand, we, who can look at the royalist theory in the light of subsequent history, may justly say that, though superior as a theory, it was merely academic, because it was in practice impossible of realization. It is true that Whitelocke's theory was not workable unless and until Parliament had asserted its position as the predominant partner in the state; but the royalist theory was equally unworkable unless and until the king had proved himself to be definitely stronger than Parliament. Neither theory was capable of realization so long as king and Parliament stood over against one another as equal, coordinate, and opposed powers.

Whitelocke's theory of the sovereignty of the king in Parliament, and Coke's complementary theory of the supremacy of the law,[37] became, as the result of the Great Rebellion and the Revolution, accepted principles of the English constitution. But it was also a result both of the Great Rebellion and the Revolution that the

[37] For Coke's theory of the supremacy of the law see Holdsworth, *H.E.L.* v 428, 454, 491, 493.

rights of the subject should be stressed. As the result of the Great Rebellion, Parliament was set side by side with the king as a part of the permanent government of the country; and its powers were recognized as being as definite and as well established as the powers conferred by the prerogative. As the result of the Revolution, Parliament won its right to be the predominant partner in the constitution. Hence those constitutional rights of Englishmen, for which Parliament had always stood, assumed a position of greater importance than the theory of sovereignty; and they were safeguarded by the independence which the Act of Settlement had secured for the judges—the sovereignty of the state was balanced, as Burke said it ought to be balanced, by the judicial authority.[38] This is clear from Locke's *Two Treatises of Government.* In his view, it is for the sake of these constitutional rights that political society was founded; so that an absolute monarchy, which provides no security against their violation, can hardly be considered to be a form of political society.[39] It follows that the government of the state is not the superior of the subject, but his agent or delegate to carry out the purpose for which the state was created—the safeguarding of the rights of the subject; and that if it fails to

[38] "Whatever is supreme in a state, ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give a security to its justice against its power," *French Revolution* 303.

[39] "Absolute monarchy, which by some men is counted for the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all," Bk. ii § 90; cp. also § 93.

carry out this purpose it can be dismissed.[40] Obviously there is no place in Locke's scheme for any theory of sovereignty.

It is for this reason that, even at the end of the seventeenth century, the theory of sovereignty was either very loosely held, or even misunderstood both by statesmen and lawyers. Hobbes, the one Englishman who had really grasped the theory, failed to influence his contemporaries, because his theories were detested by statesmen like Clarendon, by lawyers like Hale, and of course by all theologians, for the very sufficient reason that his political philosophy attacked the practice and theories of all. It attacked the received technicalities of politics, of law, and of theology; and it denied those divine and natural rights, upon which the political theories of statesmen, lawyers, and theologians rested.[41] It is true that one eminent Whig statesman,

[40] "All power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew when they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject," Bk. ii § 149.

[41] Maitland, *Collected Works* i 9-11; Holdsworth, *H.E.L.* vi 298; Maitland, *op. cit.*, 25-6 points out that both Milton and Sydney held the view that laws contrary to God, reason, or nature, ought not to be obeyed; on this ground Milton argued that the execution of Charles I was legal because it was in accordance with the law of God to kill a tyrant, and that even a statute giving tyrannical power to the king had no validity.

the Marquis of Halifax, had a firm grasp of the theory of sovereignty;[42] but he held it rather as an academic theory, and laid no great stress on it.[43] Hale, in his criticism of Hobbes,[44] quite misunderstood his theory of sovereignty. He interpreted sovereignty as meaning simply a supremacy, which was not incompatible with the supremacy of Parliament or the law in their several spheres. This sovereignty he attributes to the king; and then proceeds to show that the sovereignty, which Hobbes analyzed and explained, was contrary to the rules of English law. Vaughan C. J.'s remarks in *Thomas v. Sorrell* show that another distinguished English lawyer had not got rid of the mediaeval idea that limitations were imposed upon the king, Parliament,

[42] "He believeth no government is perfect except a kind of omnipotency reside in it to be exercised upon great occasions. Now this cannot be attained by force alone upon the people. . . . There must be their consent too," *Character of a Trimmer*, Foxcroft, *Life of Halifax* ii 298-299; "there can be no government without a supreme power. . . . Supreme power can no more be limited than infinity can be measured because it ceaseth to be the thing; its very being is dissolved when any bounds can be put to it," *Anatomy of an Equivalent*, Foxcroft ii 439; "I lay it down then as fundamental—first that in every constitution there is some power which neither will nor ought to be bounded;" "for this world, there can be no government without a stated rule, and a Supreme Power not to be controlled neither by the dead nor the living;" "to say a power is supreme and not arbitrary is not sense," *Political Thoughts*, Foxcroft ii 495-497.

[43] *Character of a Trimmer*, Foxcroft ii 298-300; cp. Holdsworth, *H.E.L.* vi 287.

[44] His tract is printed in Holdsworth, *H.E.L.* v App. III.

and other law making bodies by the law of God.[45] The debate on the Septennial Act of 1716 shows that many members of the House of Commons thought that the Legislature had no power to modify that Act; and that they denied the proposition that there were no legal restrictions on its power.[45a] Blackstone, like Whitelocke, lays it down that "the supreme and absolute authority of the state" is vested in the king in Parliament.[46] He expressly admits that it is there that the sovereign power resides; and he combats Locke's view that the people can get rid of their Legislature if it acts contrary to the trust reposed in it, by failing to safeguard those rights for the sake of which a civil government was formed.[47] But even Blackstone, in earlier passages, hard to be reconciled with his later attribution of an uncontrolled legislative power, and therefore sovereignty,[48] to Parliament, seems to say that no human laws are of any validity if contrary to the laws of God or of nature.[49] I think that we can almost say that these ideas

[45] "No human authority can make lawful what divine authority hath made unlawful, without God's leave, and then it is by his authority," (1674) *Vaughan* at p. 339.

[45a] Cobbett, *Parl. Hist.* vii 317, 334, 339, 348-9.

[46] *Comm.* i 147.

[47] *Ibid.* 160-162.

[48] *Ibid.* i 52.

[49] "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other . . . no human laws are of any validity if contrary to this," *Comm.* i 41; "those rights which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually vested in every man than they are. . . . No human legis-

came more naturally to him than the idea of sovereignty; for, like Locke, he considered that the principal aim of society was to protect the rights of men which had been given to them by the law of nature.[50] In fact, the division of the sovereign power in England, to which Blackstone, following Montesquieu, was inclined to ascribe much of the excellence of the English constitution,[51] tended in England, as later in America, to prevent the sovereign from acting frequently and regularly. It tended to relegate the theory of sovereignty to the background, and to put the rights of the subject into the foreground of the picture, because it was for their sake that political society existed.

lature has power to abridge and destroy them, unless the owner shall himself commit some act that amounts to a forfeiture," *ibid.* i 54; Blackstone no doubt was influenced by Locke, who was influenced by Sydney, and by dicta such as those of Vaughan, C.J., in Thomas *v.* Sorrell, see Pollock, *Essays in the Law* 97; I think too that he was also influenced by the *Doctor and Student*—compare these two passages: in the *Doctor and Student* in cap. 10 of the additions to the second Dialogue it is said, "for commonly the Parliament hath over those laws [the laws of God and of reason] no direct power; but to strengthen them, and to make them to be more surely kept, it hath good power;" Blackstone says, *Comm.* i 54, that a human legislature "in all these cases [where it legislates on matters provided for by the law of God or of nature] acts only in subordination to the great lawgiver, transcribing and publishing his precepts. So that the declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong."

[50] *Comm.* i 124; Montesquieu had also come to the same conclusion, and probably also under the influence of Locke, see *De l'Esprit des Lois* Bk. xi cc. v and vi.

[51] Above 52-53.

We have seen that it was the changed industrial and intellectual conditions of the late eighteenth and nineteenth centuries, which made extensive legislative changes necessary; and that Bentham taught the Legislature to use the principle of utility as a guide to, and a criterion of, these changes.[52] This made it inevitable that the sovereignty of the Legislature should be brought into prominence; and, since the divine rights of kings and the natural rights of peoples no longer formed the premises of political theorists, Hobbes's theory of sovereignty at last came into its own.[53] As Bodin in the sixteenth century had, by a generalization from the dominant political tendencies of his day,[54] produced a theory of sovereignty, so Austin in the nineteenth century, by a generalization from the dominant legislative tendencies of his day, produced a theory of jurisprudence founded on that theory.

The school of analytical jurisprudence, founded by Austin, made English lawyers and statesmen realize the theory of sovereignty more distinctly than they had ever realized it before. But, in the nineteenth century as in the sixteenth century, they admitted it and used it so far as they found it convenient to use it; but they refused to become its slaves. Two great lessons from history had taught them the folly of such a course. The Stuarts had fallen because they had relied too much on a theory of sovereignty based upon divine right,

[52] Above 44-45.
[53] Holdsworth, *H.E.L.* vi 299.
[54] Above 117-118.

which, as a theory, was both neat and logical. America had been lost because the theoretical claims of sovereignty had been relied on to solve questions at issue between England and her colonies. These theoretical claims had been relied on in spite of the political wisdom and historical truth of Burke's demonstration that, as between the head of an empire and its component states, "the line between local privileges and the supreme common authority may be extremely nice"; [55] that "though every privilege is an exemption from the ordinary exercise of the supreme authority, it is no denial of it"; [56] and that nothing was "more completely imprudent than for the head of the empire to insist, that, if any privilege is pleaded against his will, or his acts, his whole authority is denied." [57] Those lessons had been learned. Austin's jurisprudence was published in 1832, and during the succeeding years of the nineteenth century its influence was great. But the leading principles of responsible government were developed in Canada between 1840 and 1850, and were applied to the other great Dominions long before the end of the nineteenth century.[58] Moreover, throughout that century, and in spite of all changes in the organs of local government, the large discretion given to those respon-

[55] Speech on Conciliation with America *Works* (Bohn's Ed.) i 476.

[56] *Ibid.*

[57] *Ibid.* 477; cp. "the Present State of the Nation," *Works* i 280, "politics ought to be adjusted, not to human reasonings, but to human nature; of which the reason is but a part, and by no means the greatest part."

[58] Anson, *Law of the Constitution* (3rd Ed.) vol ii Pt ii 69-70.

sible for that government is as obvious as it was in the sixteenth century.[59]

In these latter days there are some who have found it difficult to reconcile the theory of sovereignty with modern facts. This is due mainly to two allied causes. In the first place, the very absolute theory of sovereignty, which modern democratic states inherited from the *ancien régime,* is becoming more difficult to reconcile with that much enlarged list of natural rights, which modern socialists have taught modern democracies to demand at the hands of the state.[60] In the second place, Dicey has pointed out that the democratic demand that law should be made to correspond as quickly as possible with public opinion, leads to the idea that the state has no moral right to enforce a law to which a large number of citizens object; and that citizens have a moral right to oppose such a law by force.[61]

[59] Above 123. Professor Laski says, *Foundations of Sovereignty,* 169, "sovereign your state no longer is if the groups within it are self-governing"; but this is plainly untrue as applied to the English constitution, for it involves the denial of the sovereignty of the King in Parliament.

[60] Professor Laski, *Foundations of Sovereignty,* 245-6 enumerates freedom of speech, a living wage, an adequate education, a proper amount of leisure, the power to combine for social effort.

[61] *Law of the Constitution* (8th Ed.) xli-xliii; as Dicey very truly says, "the time has come when the fact ought to be generally admitted that the amount of government, that is of coercion, of individuals or classes by the state, which is necessary to the welfare or even to the existence of a civilized community, cannot permanently co-exist with the effective belief that deference to public opinion is in all cases the sole or the necessary basis of a democracy."

Hence a growth of lawlessness, which has led some thinkers to suggest that the doctrine both of sovereignty, and of natural rights protected by that sovereignty, are worn out and should be discarded. Duguit, the most prominent representative of this school, has suggested that sovereignty is a fiction—it is merely the will of certain individuals, who have no right to impose their will on others; and that man *qua* natural individual man can have no rights.[62] He holds that the concept 'right' implies the concept 'social life'; and that a man's rights are derived only from his life in society. He suggests, therefore, that the basis of society is social solidarity, and that society should be so organized as to satisfy social needs.[63] It follows that the organs of such a society have no power to issue commands to subjects. These organs are confined to organizing public services;[64] and their acts "have neither force nor legal value save as they contribute to this end." [65] He maintains that his theories gain support from certain new developments of law and government in France, of which he gives the following instances: the admission that the state has duties,[66] that the government recognizes its obligations to perform many more public services now than it did in the past,[67] that both the organizations which supply these services,[68] and the local governing bodies,[69] have now a measure of independence

[62] *Law in the Modern State* (Laski's Tr.) xix-xx.
[63] *Ibid.* xli-xliv.
[64] *Ibid.* 30-31, 49.
[65] *Ibid.* xliii.
[66] *Ibid.* Chap ii.
[67] *Ibid.* 30-1, 45-48.
[68] *Ibid.* 102-5.
[69] *Ibid.* 97-100.

and initiative, which they have never had before, that the rights of the individual as against the state are better protected.[70]

Looking at theories of this kind from a purely theoretical aspect, I agree with the criticism of Vinogradoff.[71] He says: "It is more than doubtful whether the author has succeeded in providing his nation of social solidarity with sufficiently definite attributes to enable it to act as a foundation for a system of law. We may extend or minimize the part played by the organized commonwealth in the life and conduct of its individual members, but it is difficult to see how even a socialistic commonwealth can get rid of the contrast between the personal and the public, the social and the individual. As a society organized for rule, it is bound to assume the form of a super-physical person." But that necessarily involves the exercise of some form of sovereignty.

Looking at theories of this kind from the standpoint of our own legal history, I think it is obvious that they ignore the fact that the acceptance of the doctrine of sovereignty does not involve its absolute and logical application to all the facts of state life. Logic and clear cut theory no doubt have their uses. They are at the root of that lucidity for which the French intellect is famous; and they helped both Bodin and the statesmen of the French Revolution to state their theory of sovereignty with a precision, which in England only Hobbes and Austin have equalled. But logic and clear cut the-

[70] *Ibid.*, 56-67, and chap. vii.

[71] *Historical Jurisprudence* i 151.

ory have their dangers; and English lawyers have always been ready to admit that the incoherence of facts must sometimes be allowed to modify the results of pure logic. Lord Somers once distinguished between the kind of reasoning appropriate to the discussion of philosophical subjects or the natural existence of things, and the kind of reasoning appropriate to the discussion of legal subjects, "where fictious relations and conclusions have place;" [72] and this distinction would have been approved both by Hale [73] and Burke.[74]

[72] Criticizing a dictum that it was "quasi absurdum et impossible," that a court dissolved one day could be treated as existing and united to another court on the following day, he said, "we are not now discussing upon a subject of philosophy, nor speaking of the natural existence of things. Then indeed it would be absurd to say, that what was dissolved and annihilated one day should yet have such an existence as to be united to anything the day following; but we are speaking of a legal subject, touching the construction of a law where fictious relations and conclusions have place," the *Bankers' Case* (1700) 14 S.T. at p. 90.

[73] "Of all Kind of Subjects where about ye reasoning Facultie is conversant, there is none of So greate a difficulty for the Faculty of reason to guide it Selfe and come to any Steddiness as that of Laws, for the regulation and Ordering of Civil Societies and for the measureing of right and wrong, when it comes to particulars. And therefore it is not possible for men to come to the Same Certainty, evidence and Demonstration touching them as may be expected in Mathematicall Sciences," Hale's criticism of Hobbes, Holdsworth *H.E.L.* v. 502.

[74] "The nature of man is intricate; the objects of society are of the greatest possible complexity; and therefore no simple disposition or direction of power can be suitable either to man's nature, or to the quality of his affairs. . . . The pretended rights of these theorists are all in extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of *middle*, incapable of definition,

Our legal history shows that both lawyers and statesmen have borne this distinction in mind in their treatment of the theory of sovereignty. They have admitted the doctrine; but they have shown that it is possible to hold it, and yet admit all sorts of modifications in practice; that it is possible to recognize and protect constitutional rights without abandoning it. Such modifications are, as Burke said, "the immutable condition, the eternal law, of extensive and detached empire." [75] And Vinogradoff agrees:[76] "the notion of sovereignty ought not to be taken as an absolute principle, but as a generalization subject to various contingencies." If we look at the relations between our colonies and the mother country, at our system of local government and its relations to the central government, at our independent judiciary, we can see that these modifications have been applied to the theory of sovereignty without abandoning it, and the advantages which it has conferred on society.

The great achievements of the doctrine of sovereignty were the mastering the lawlessness of the mediaeval state, and the provision, in the modern territorial state,

but not impossible to be discerned. The rights of men in governments are their advantages; and these are often in balances between differences of good; in compromises sometimes between good and evil, and sometimes between evil and evil. Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically or mathematically, true moral denominations." Burke, *French Revolution* 91-2.

[75] Speech on Conciliation with America, *Works* (Bohn's Ed.) i 469.

[76] *Historical Jurisprudence* i 122-3.

of an organism which, by keeping the peace, has made social and political progress possible. The measure of its achievement is the contrast between the state of Europe in 1500 and in 1700. We are so accustomed to the efficient manner in which lawlessness and crime are suppressed, that we are too apt to forget that this result has been achieved through the ceaseless efforts of the ministers of the state, using powers and machinery which owe their origin and their force to the sovereignty of the state. I think that those who go about to deny or minimize this sovereignty have forgotten this fact. They have forgotten that in the smaller matters of government, which concern the daily intercourse of man and man, it is the fact of the state's sovereignty which causes the machine to run smoothly; and that in a time of crisis they may have reason to be thankful for its existence. As Dicey, writing in 1914, has well said,[77] "Crises arise from time to time in the history of any great state when, because national existence or national independence is at stake, the mass of a whole people feel that the authority of the nation is the one patent and one certain political fact."

This forgetfulness of the benefits which we owe to the fact of the sovereignty of the state recalls to my mind a remark made by that acute observer of human nature, Walter Bagehot, in one of his Literary Studies. Writing on the subject of Sir Walter Scott's novels, he said that boys reading Ivanhoe often wish that they were living in those times, because they assume that they

[77] *Law of the Constitution* (8th Ed.) xliii.

would continue to enjoy all the advantages of the civilization to which they are accustomed, and that there would be plenty of fighting in addition.[78] So with these speculators who think they can eliminate the sovereignty of the state. They assume that crime and lawlessness will be suppressed, and that peace and order will prevail in their new society, in which the power of a sovereign state has been eliminated. But, while human nature remains what it is, it is certain that Hobbes's dictum,[79] that "covenants, without the sword, are but words, and of no strength to secure a man at all," will continue to be true.

I have admitted that the theory of sovereignty may be strained too high. It is equally possible that the benefits to be derived from such an acceptance of it as is suitable to the state or states, to which it is to be applied, may be rated too low. Blackstone, as we have seen, found the secret of the success of the British constitution in the fact that its sovereignty was lodged in the composite body of king, lords, and commons, whose wishes and aims counteracted one another.[80]

[78] *Literary Studies* i 169, "All sensible people know that the middle ages must have been very uncomfortable; there was a difficulty about 'good food': —almost insuperable obstacles to the cultivation of nice detail and small enjoyment. No one knew the abstract facts on which this conclusion rests better than Scott; but his delineation gives no general idea of the result. A thoughtless reader rises with the impression that the middle ages had the same elements of happiness which we have at present, and that they had fighting besides."

[79] *Leviathan* Bk. i c. 17 p. 86.

[80] Above 52.

Whatever we may think of his analysis of the secret of the success of the British constitution, there is I think a sense in which we can apply a similar analysis to the right application of the sovereignty of the state to concrete facts. We must admit it; but we must not press it so far that we deprive all members and groups of members within the state, of all independent power and initiative; nor must we minimize it so much that the state loses all control of its members or groups of members. Our legal history teaches us that this has been the course pursued by English statesmen and lawyers. In the past, when continental states stretched the rights of sovereignty so far that the rights of individuals were in danger of being forgotten, English law was unique in the extent of the protection which it afforded to those rights. At the present day, when some have maintained that the doctrine of sovereignty should be discarded as an outworn doctrine, English law firmly maintains the sovereignty of the king in Parliament.[81] We can thus still use of the English constitution the words which the Marquis of Halifax used of it at the end of the seventeenth century—"A blessed constitution in which dominion and liberty are happily reconciled." [82]

Similarly, in the past, when in continental states the

[81] A. Lawrence Lowell has said of the political system of England that it "was never that of an absolute monarchy, and has never become quite a democracy of the traditional type, but has ever carried the forms of one age over into the next, and thus combined some of their virtues," *Public Opinion and Popular Government* 295.

[82] *Character of a Trimmer*, Foxcroft, *op. cit.* ii 296.

duty of loyalty to the state was allowed to leave no room for subordinate loyalties to other groups or associations, English law allowed all sorts of communities, corporate and unincorporate, to perform, subject to the law, all kinds of functions, governmental and otherwise. At the present day, when it is held by many that loyalty to these other associations should outweigh loyalty to the state, it is to be hoped that English law will, through the sovereignty of the king in Parliament, firmly maintain its control over them. Of this separate but allied topic—the problems to which the recognition of incorporate persons and unincorporate groups of persons have given rise, I must now speak briefly.

INCORPORATE PERSONS AND UNINCORPORATE GROUPS

At first sight it might seem that there is little relation between this topic and the topic of sovereignty. As a matter of fact the attitude of the state to incorporate persons and unincorporate groups is at the present day, and has, throughout its history, been closely connected with the theory of sovereignty. The reason for this close connection is not far to seek. It depends on the obvious fact, to which Burke called attention in his *Reflections on the French Revolution,* that "liberty when men act in bodies is power." [83] The sovereign, whether he be an individual or an assembly of individuals, can never be indifferent to the creation or the use of a power which may rival his own.

[83] At p. 9.

A very slight historical sketch will show (1) that the development of the law as to these incorporate persons and unincorporate groups has followed very closely developments in the theory of sovereignty; (2) that differences in the English and continental theories of sovereignty are reflected in the differences between English and continental law on these topics; and (3) that differences between English and continental speculation on these topics are not unconnected with the different manner in which English and continental law has developed. I shall deal with this topic from these three points of view; and, in conclusion, I shall say a few words as to the lessons which I think should be drawn from this comparison.

(1) The Middle Ages knew many communities and groups of different kinds; and these groups or communities were regarded as living organisms, each having as independent a life of its own as the human beings who composed them. Indeed, the community, which will become the state, was originally only one among many rival communities.[84] The manor is the kingdom in little, and the powers of the king were little more than the powers of other feudal lords writ large.[85] But we have seen that the modern territorial state became

[84] "Like Mankind as a whole, so, not only the Universal Church and the Universal Empire, but also every Particular Church and every Particular State, and indeed every permanent human group is compared to a natural body (*corpus naturale et organicum*)," Gierke, *Political Theories of the Middle Age* (Maitland's Tr.) 24; cp. Holdsworth, *H.E.L.* (3rd Ed.) ii 401-3.

[85] Vinogradoff, *Villeinage* 324-5; *P.* and *M.* i 497.

a community very different from any other community. It had no superior; and the civil and canon lawyers attributed to its head many of those imperial prerogatives which will help it to attain sovereignty.[86] But we have seen that that sovereignty could not be attained in actual fact by the head of the state, till he had asserted his superiority over the rival communities, which claimed to possess independent power in their own right. In dealing with these communities the sovereign was helped by another doctrine of the canonists and civilians. They held that the only bodies which the state could recognize were persons—either natural persons, or fictitious persons, i.e. corporations; and that it was only the sovereign who could create a fictitious or corporate person.[87] This leads straight to the 'Concession Theory.' As Maitland says, it leads to the view that, "the corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust." [88] This was comfortable doctrine to a sovereign who wished to establish his power over the rival power of independent communities. In France, and in other continental countries, it became the received doctrine of the state. It followed that the existence of these independent communities suffered the same fate as the rights of the individual—both came to be wholly dependent on the good will of the sovereign.

[86] Above 113-114.

[87] Gierke, *op. cit.* 98-100; Maitland's *Introd.* xxx.

[88] *Political Theories of the Middle Age* xxx.

And just as the French Revolution in no way altered the theory of sovereignty, so it in no way altered the way in which the law regarded unincorporate groups of persons. The formation of all groups of any kind or for any purpose was forbidden by French law at the beginning of the nineteenth century, because they tended to diminish the loyalty of the citizen to the state, and to promote particular interests, which might conflict with the interests of the general body of the citizens.[89] French legislators fully agreed with Hobbes's view that, "Leagues of the subjects of one and the same Commonwealth, where every one may obtain his right by means of the Sovereign Power are unnecessary to the maintaining of Peace and Justice, and (in case the designe of them be evill or Unknown to the Commonwealth) unlawful";[90] and that even corporations are "like wormes in the entrayles of a naturall man."[91] Chartered corporations, indeed, and commercial partnerships were recognized; and, during the nineteenth century, all kinds of commercial associations, corporate and unincorporate, have been recognized and regulated

[89] Dicey, *Law and Opinion* (2nd Ed.) 474, citing Pic, *Traité Elémentaire de Législation* 212; Barthélemy, *Le Gouvernement de la France* 232, tells us that, since a group, other than a group formed to make profits, may acquire a power which will be troublesome to the government, they were not allowed to exist—"pendant tout le XIXe siècle, la France a vécu sous le régime de l'article 291 du Code pénal qui supprimait la liberté d'association: les associations de plus de 20 personnes ne pouvaient se former qu'avec l'autorisation gouvernementale."

[90] *Leviathan* Bk. II c. 22, p. 122.

[91] *Ibid.* c. 29, p. 174.

by commercial law. But, till the latter part of the nineteenth century, the attitude of the state to other associations was not modified, and the principle that all citizens have a right to make these associations for other than commercial purposes was not conceded till 1901.[92]

Obviously these ideas tied up within very straight limits the right of association. It is not surprising, therefore, that the desire to enlarge this right should have taken the form of questioning the theory on which it was based; and that this questioning should have given rise to much speculation as to corporate personality, and as to the nature of the unincorporate group. But before I can deal with this I must say a few words as to the differences between the English and the continental law on this subject.

(2) England received the Concession Theory, just as it received the theory of sovereignty—though it is probable that it reached this Concession Theory, in part at any rate, by a road of its own.[93] From the Middle Ages onwards, the common law has recognized that a corporation can only be created either mediately or immediately by the crown, or by Act of Parliament.[94] But just as England applied the doctrine of sovereignty in such a way that the rights of the subject were protected by law, and thus did not become merely moral rights, so this Concession Theory was applied with a like moderation. In the first place, some of the old communities

[92] Barthélemy, *op. cit.* 232-3.
[93] Holdsworth, *H.E.L.* (3rd Ed.) iii 476-7.
[94] *Ibid.* 475 Bl. Comm. i 472-5.

survived. Thus the communities through which the local government was carried on—counties hundreds and townships—long survived, and transmitted the traditions of independent self-government to their successors the justices of the peace; [95] so that in these last days it has been possible to use some of them as a basis of a reformed scheme of local government. Moreover, the legal profession and legal education were organized by the unincorporate Inns of Court. In the second place, the development of the Trust enabled property to be held by trustees for very various purposes. But a device by which a group of persons may, through the medium of trustees, be given the power to use property for the furtherance of the purposes of the group, is capable of the most diverse applications; and, as Maitland has shown, it has been used, from the sixteenth century onwards, to effect a large number of different purposes—religious, governmental, social, commercial and literary.[96] Thus the Trust preserved, in a shape suited to modern legal and political ideas, the mediaeval power to create semi-autonomous groups. It is true that these groups, which depend for their life upon a body of trustees, acting under a trust deed which defines their powers, cannot so easily modify the sphere of their activities to meet new circumstances, as the semi-autonomous mediaeval communities—the trust deed gives something of the rigidity of a written constitution. It was difficult, as the United Free Church of Scot-

[95] Above 123.

[96] *Trust and Corporation*, Collected Papers, iii 356-403.

land found, to alter even slightly the purposes for which the trust was created, without losing all right to the trust property.[97] They are not therefore suited to the conduct of a business which must adapt itself to new emergencies. But, when all deductions have been made, it is clear that, if England had not evolved the trust concept, the conditions under which the law would recognize the existence and activities of an unincorporate group would have been as vital a question as it became abroad.[98]

It is because England has admitted these modifications of the Concession Theory that continental theories as to the nature of corporate and group personality have never aroused the same interest as in continental countries. It has not been necessary in England, as it was necessary abroad, to attack the rigidity which the Concession Theory imposes upon the state recognition of corporate life. No doubt England has profited by the larger liberty of association which has thus been made possible, just as she has profited by the modifications which the law has always permitted to the strict theory of sovereignty. At the same time we shall see that the absence of speculation on this topic has not been without its dangers.

(3) The continental speculations, to which Maitland introduced English lawyers and political philosophers, start from the premise that corporate life is not the

[97] General Assembly of the Free Church of Scotland *v.* Lord Overton [1904] A.C. 515.

[98] *Political Theories of the Middle Age* xxix-xxx.

gift of the state. All organized groups, it is said, have a real life of their own which is just as independent of state authorization as the life of the natural man.[99] It follows that the state should recognize the existence of this real life, just as it recognizes the existence of the life of the natural man.[100] And some would go even further, and say that these groups, whether corporate or unincorporate, should have just the same freedom of action as natural men; and that, therefore, "the distinction between incorporate and voluntary association must be abolished."[101] It follows that the obsolete doctrine of *ultra vires* should be swept away.[102] It is easy to see that these speculations somewhat easily connect themselves with the view that sovereignty is a worn out institution;[103] and that all the power of the state should be conceded to these various groups and associations. Professor Laski, following Duguit, says,[104] "We must start from the admission that the allegiance of man is diverse and that where his loyal-

[99] *Political Theories of the Middle Age* xxv-xxvi.

[100] *Ibid.* xxxvii-viii.

[101] Laski, *Foundations of Sovereignty* 168.

[102] *Ibid.* 152.

[103] Above 134.

[104] *Foundations of Sovereignty* viii; *ibid.* at p. 170, he says, "we give to this latter group [the state] no peculiar merit. We refuse it the title of the creator of all else. We make it justify itself by its consequences. We stimulate its activities by making it compete with the work of other groups co-extensive with or complementary to itself. As it may not extinguish, so it may not claim preeminence:" I entirely deny, for the reasons given below, 152-4, that these consequences follow from the admission of the reality of the personality of associations.

ties conflict it is ultimately both safer and better for the community that this instructed conscience should be the source of his decision. It would follow that there is no such thing as the sovereignty contemplated by law in any sense which admits of practical political application. In actual fact what we meet is a variety of interests, functional and territorial; and the way in which they are related suggests the necessarily federal character of all government. The main advantage of this federal structure is that it affords better channels for the operation of an active consent upon the part of citizens than any other method. Nor must this federalism be conceived in merely spatial terms. It applies not less, say to the government of the mines than to the government of Ireland or of Massachusetts. Ultimately it suggests not only a partition of sovereignty in terms of function but also a complete revision of the accepted notion of property. Where the interests of each touch upon the other, it is clear enough that some mechanism of ultimate adjustment will be needed; but the main thing is to avoid a system in which supreme power is concentrated at a single point in the body public."

Obviously a scheme which will make of the state a confederation of nearly independent groups, takes us right back to the anarchy of mediæval political society; and it will be an anarchy which, as I have said in another connection, will be destitute of those spiritual elements which sprang from the deeply rooted religious

faith of mediaeval men.[105] The reality of corporate personality involves a reality in vice as well as in virtue. The selfishness of a group, disguised under the form of group loyalty, will be a danger to other groups and persons and to the state, proportioned to its size and power.[106] Professor Laski envisages a "mechanism of ultimate adjustment." But it is difficult to see how such a mechanism can regularly and easily get itself obeyed, unless it has at its back some force which cannot be readily distinguished from sovereignty.

English lawyers have been very lightly touched by these speculations. Just as they have learned not to strain the doctrine of sovereignty to the breaking point, and yet to keep it for emergencies, so they have learned

[105] Professor Laski has seen the parallel. He says, *Foundations of Sovereignty* 248-9, "those who take refuge in the irrefutable logic of the sovereign state may sometimes take thought that for many centuries of mediæval history the very notion of sovereignty was unknown. I would not seek unduly to magnify those far off times; but it is worth while to remember that no thoughts were dearer to the hearts of mediæval thinkers than ideals of right and justice." I draw a moral from the parallel quite opposite to that which he draws.

[106] As A. Lawrence Lowell has truly said, *Public Opinion and Popular Government* 40, "No one can have observed social life carefully . . . without seeing that cooperative interests have in some measure replaced personal ones. . . . This is among the dominant notes of our time, and while the change is for the better, because it means greater devotion to something higher than purely personal objects, that very fact, whether the body be a bank, a railroad company, or a trade union, may cover with a gilding of altruism what is after all only cooperative selfishness."

not to strain the doctrine that there can be no corporate life without the gift of the state, and yet to retain it as a working rule. They have been able to retain it as a working rule because they have made it easy for groups of men, associated for lawful purposes, to acquire corporate form. In that way they have secured the retention of those advantages of regulation and control, which flow from the recognition of the fact that corporate life is the gift of the state. At the same time the Trust Concept enables certain associations to exist in an unincorporate form. But it should however be observed that the state retains and has used its power to regulate these trusts whenever regulation seems to be necessary.[107] It must, however, be admitted that the untheoretic and somewhat haphazard way in which English law has developed, has not been without its dangers. Our older lawyers saw clearly enough that it was necessary to provide a machinery by which corporate life should be suspended or annihilated if the corporation was guilty of wrongs.[108] But our modern Company Acts, intent upon facilitating the assumption of corporate form, and laying down the conditions of its exercise, have provided no machinery by which a Company can be disincorporated.[109] Our older lawyers saw the

[107] E.g. the Act of 9 George II c. 36 relating to charitable trusts.

[108] Holdsworth, *H.E.L.* (3rd Ed.) iii 478-9; ix 46-7, 65-6; see the quo warranto proceedings against the City of London (1682) 8 S.T. at p. 1178.

[109] Princess of Reuss *v.* Bos, (1871) L.R. 5 H. of L. at pp. 192, 202; Holdsworth, *H.E.L.* ix 66; I think that this was one of the

danger of allowing large unincorporated groups; and in 1720, under the influence of the panic caused by the bursting of the South Sea Bubble, they passed an Act, which, in order to suppress them, adopted the mistaken policy of making the assumption of corporate form difficult.[110] The object was good, though the means taken to attain it were unwise.[111] Our modern politicians have so completely failed to see the danger of large unincorporated societies, that they have actually put Trades Unions—the most powerful of them all—in many respects above the law.[112]

The lessons which I should draw from this history are as follows:

In the first place, I do not think that any one has ever really denied that a group has a real life of its own. As Dicey has said, "Whenever men act in concert for a common purpose, they tend to create a body, which from no fiction of law, but from the very nature of things differs from the individuals of whom it is constituted."[113] I think that it was because rulers recognized the reality of the life of

reasons which induced the House of Lords, in the Daimler Case [1916] 2 A.C. 307, to break the first principle of corporation law, by disregarding the distinction between the corporation and its members, and to justify this breach by means of an analogy which was, to say the least, misleading, see Holdsworth, *H.E.L.* ix 103, n. 3.

[110] 6 George I c. 18 §§ 18-22.

[111] Scott, *Joint Stock Companies* i 438; Holdsworth, *H.E.L.* viii 220-221.

[112] *The Trade Disputes Act* 1906, 6 Edward VII c. 47.

[113] *Law and Opinion,* (2nd Ed.) 154.

a group, that they insisted so strongly that, for a legal life, it must have the authority of the state. That was the substantial ground for the Concession Theory. Whether the legal life given by the state to the corporate person is real or fictitious is, it seems to me, a minor question—at any rate for the lawyer and the statesman.[114] Hence the proof that an unincorporate group has a real life, though it may disprove the Fiction Theory, has no bearing on the Concession Theory. The Concession Theory may in the past have been grounded partly on the Fiction Theory. But the two have no necessary connection; and so a disproof of the Fiction Theory does not invalidate those plain grounds of public policy upon which the Concession Theory rests.

In the second place, the unlimited right of association which, it is said, flows from the reality of the life of all groups, may obviously be fatal to individual liberty. As Dicey says, "A private citizen has often found it impossible to disobey the commands of a political association or of a church."[115] Thus, just as the state found it necessary to restrict the right to dispose of one's property at one's will, in order to prevent unrestricted freedom of alienation from being used to its own destruction; so it is necessary to restrict the right of association, in order to prevent it from being so used as to destroy individual liberty. The weapon, in the case of the right to dispose of

[114] See H. A. Smith, *Law of Associations* 128 seqq.
[115] *Law and Opinion,* (2nd Ed.) 154-5.

property, is the rule against perpetuities. In the case of the right of association, the weapon should, I think, be the need to get incorporation—a truth which was partially recognized by the Legislature when it prohibited unincorporate companies of more than ten persons for the business of banking, and of more than twenty persons for any other business.[116] Our recent experience of a general strike shows the folly of allowing the existence of these large unincorporate bodies, and illustrates the need for a state which can, in an emergency, exercise its sovereign power. In my opinion it is a wise policy to "keep the corporate form under lock and key," in order that the state may be able to impose such conditions upon the conduct of these groups and associations that they are effectively subordinated to the law.

Lastly, our common lawyers, without committing themselves to any specific theory as to the nature of corporate personality, have, I think, evolved the common sense view that a corporation is to be given, so far as is consistent with its artificial nature and with the purposes for which it is created, the capacities and liabilities of a natural man.[117] A commonplace conclusion, you will perhaps say; but, as Mr. Justice Holmes

[116] Companies (Consolidation) Act 1908 § 1.

[117] This was the view of Story. Mr. Warren, *History of the American Bar* 505, cites a letter of Story to Kent on the decisions in Louisville R.R. *v.* Letson (1844) 2 Howard 497, in which he says, "I equally rejoice that the Supreme Court has at last come to the conclusion, that a corporation is a citizen, an artificial citizen, I agree, but still a citizen."

has said in this University, "it is better that the law should be commonplace than that it should be eccentric"; [118] and it is, I think, as workable a theory of the nature of corporate personality as can be devised—provided that adequate means are provided for enforcing criminal and civil liability. It is a theory of corporate personality which is flexible enough to be applied to all large groups and associations; and, by reason of the power which these large groups and associations possess, they should, in the interests of order and liberty, only be allowed to exist as corporate bodies, under such state-imposed conditions as are necessary to the proper regulation and control of their activities.

Two connected tendencies can be observed in our world of today.

In the first place, the inventions of modern science have diminished the size of the world, and have thus made it possible for new legal and political ideas to assume a cosmopolitan character. This has its good side. Nations are brought nearer together, and are helped to a better understanding of their different points of view. But it also has its dangerous side. Legal and political thinkers, who have had their eyes fixed on the inconveniences arising in a particular legal system, often make general propositions and suggest universal remedies. These propositions and remedies may, by reason of the universal way in which they are ex-

[118] *Collected Legal Papers* 276.

pressed, mislead legal and political thinkers of another country, and induce them to suppose that they are equally applicable to a different society and a different legal system. It seems to me that the attempt to apply to England some of the continental theories as to sovereignty, and as to the nature of associations corporate and unincorporate, which I have just discussed, suffer from this vice. Even assuming that they would have beneficial results if applied to the countries in which they originate (which is very doubtful), they could not be applied to the English state and English law without a revolution in our political and legal ideas. But there is a danger that students who have specialized in these continental theories, and who know little of the spirit of our historic system of law, may mislead those who know less.

In the second place, the theory of sovereignty, and the analysis of its effects upon law, have tended to separate morals from law, and to draw a hard and fast line between moral and legal rights. It is for this reason that the ethical ideals, which were at the base of mediaeval and seventeenth century legal and political reasoning, and appeared both in Burke's speeches and in Blackstone's Commentaries, tend to be replaced by considerations of expediency; and that the dominant aim of politics tends to become merely the securing of the greatest material advantage for the strongest party in the state. Necessarily this change has reacted on methods of political reasoning. Both in the Middle Ages and in the seventeenth century, politi-

cal theories were deduced logically from fixed postulates. But in modern times, when no such fixed postulates are recognized, they have tended to become merely a series of generalizations arrived at inductively, sometimes from the teachings of history, and often merely from considerations of expediency. But the conclusions of a science, which proceeds on these lines, are far more indefinite and far less authorititative than they were in the days when its conclusions were assumed to be logical deductions from great moral or religious principles. In fact, under the influence of the indeterminate and conflicting ideals of various groups of modern politicians, they tend to become merely a repertoire of arguments for the particular thesis which the writer happens to favor. It is clear that this absence of fixed principle puts a dangerous weapon into the hands of legal and political theorists. They can make a case for their theories; and they may easily make converts from those who have learning enough to understand, and not learning enough to criticize.

What then is the remedy? Are we to be blown hither and thither by every wind of doctrine? We have ceased to possess those fixed moral and religious standards which mediaeval men possessed. But I think that the study of history, and especially legal history, can be made to do something towards supplying their place. There is much wisdom in Hale's reply to the revolutionary theories propounded by Hobbes in his *Dialogue of the Common Laws*:[119] "In Morals and

[119] Holdsworth *H.E.L.* v. 502-3.

especially with relation to Lawes for a Cõmunitie, tho the Cõmon notion of Just and fitt are cõmon to all men of reason, yett when Persons come to particular application of those Cõmon Notions to particular Instances and occasions, wee shall rarely find a Cõmon Consent or agreem^{t} between men, tho' of greate reason, and that reason Improved by greate Study and Learning, wittness the greate disagreem^{t} between Plato and Aristotle, Men of greate reason in the frameing of their Laws and Cõmonwealth, the greate difference in most of the States and Kingdomes in y^{e} world in their Laws administrations and measures of right and wrong, when they come to particulars. And lett any man but Examine the weightiness of those men that p'tend to be y^{e} greate masters of Reason and possibly they may be excellent men: yett no persons differ more than they touching things of this nature. And tho' they perchance have this happiness to Shake and weaken one the oth^{rs} Principles or Conclusions, yett when they Sett up their own positions they are weake and generally displeaseing." From which he concludes that "I have reason to assure myselfe that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then is possible for the wisest Councill of Men att first to foresee. And that those amendm^{ts} and Supplem^{ts} that through the various Experiences of wise and knowing men have been applyed to any Law, must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant witts not ayded by Such a Series and tract

of Experience." [120] In other words we must have recourse to that science of jurisprudence, which Burke called the "collected reason of ages." [121]

The adoption of Hale's principles will not make us blind opponents of reform. We shall not refuse to reform those parts of our law which need reform —Hale himself suggested reforms in the law.[122] But their adoption will give us a capacity to continue to make those sane reforms which, in the past, have made our common law the great system which it is today, because it will enable us to test, by the long experience of our race, the suggestions for reform made by specialists in the political, economic, and social sciences. It will enable us to do this because the adoption of Hale's principles means a study of legal history—the history, that is, of the reason at the back of all those rules which the community has from time to time made to regulate the conduct of its members. And in the process of assimilating these principles we shall acquire what is even more valuable to the state—a reverence for our great and historic system of law, which will enable us to think of the state, as Burke thought of it, when he described it as a partnership in all sciences and art, and in every virtue and perfection; which will enable us to appreciate his thought that, for this reason, the state's law is something

[120] Holdsworth, *H.E.L.* v. 504.

[121] *French Revolution* 141.

[122] See his tract upon "the Amendment or Alteration of Laws," Harg, *Law Tracts* 253-289; cp. Holdsworth, *H.E.L.* vi 592-4.

higher than the desires and wills of a single transitory generation of men.[123] These are the services which the study of our legal history can confer. These are the lessons which it can teach. A law school which succeeds in teaching this lesson will deserve well of the state; for it will have gone far to implant in the citizens whom it teaches that law abiding instinct, and that sound political and legal sense, which are the conditions precedent for the success of democratic government.

[123] "It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born," *French Revolution* 143-4; "by this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer," *ibid.* 141.

IV. A NEW DISCOURSE ON THE STUDY OF THE LAWS

IV. A NEW DISCOURSE ON THE STUDY OF THE LAWS [1]

Mr. President, Dean Wigmore, Fellow Students, Ladies and Gentlemen,

When your University asked me to give the address at the dedication of these noble buildings, designed for one of the noblest uses to which any building can be put—the teaching of law, I felt that I had received an honor greater than any that had as yet fallen to my lot. But, in proportion to the greatness of the honor and my own consequent gratification, were my doubts whether I could give you an address which was worthy of so great an occasion. Nor were these doubts lessened by the fact that in 1902 the address at the dedication of your Law School Building was given by one of your greatest lawyers, thinkers, and orators—Mr. Justice Holmes. At the same time I cannot but admit that there is a certain fitness in the fact that the occupant of the oldest University Chair of English law in the world, should thus assist at the dedication of the newest law school buildings in the world. And more especially as William Blackstone, the first holder of the Chair, which I occupy but do not claim to fill,

[1] An address delivered on June 16, 1927, at the Dedication of the Northwestern University Law School Buildings, Chicago.

was the pioneer of that University teaching of English law, the marvelous development of which in the nineteenth and twentieth centuries has done more than anything else to preserve similarity in the fundamental principles of the law observed by the two branches of English speaking peoples.

Law, like language, is not fettered by political boundaries; nor do political cataclysms, which destroy states and empires, destroy its life. If Roman law had not survived the fall of the Roman Empire, if its precepts and its ideas had not been adapted to the needs of the new states which arose on its ruins, our civilization would be very different from what it is today. If you had not taken with you some of the ideas and principles upon which our common law is founded, neither your constitution nor your law would be what it is today. And, just as in the seventeenth century the heritage of Roman law gave to the nations of Europe an intellectual community, which made it possible for Grotius to create an international law; so, in the nineteenth and twentieth centuries, the intellectual community which comes from our common heritage of law and language, can be made the means of creating a league of nations, which needs no express covenant to give it reality. Because it is a tacit league of this kind it is not only a guarantee of peaceable intercourse, but of something much more—a guarantee of continuous intellectual cooperation in our common problems of law and government.

One of these problems, the problem which must

always be of great importance to the state, and most important of all to a university, is that of training the men upon whose shoulders rest the making and the administration of the laws of the state. In these days of constant and rapid change in many branches of knowledge, all admit the need for men whose education includes a training, not only in the technical rules of law, but also in those social and economic problems, which are the product of new needs and conditions; for it is these needs and conditions which are now shaping, as in the past they have shaped, the technical rules of law. It is the existence of many university law schools such as this in the United States and in England, it is the expansion of these schools which is proved by the existence of these new buildings, which enable us to feel confident that there will be no failure in the supply of men, who will bring to the task of solving these problems the wisdom derived from the long legal experience of our race.

More than six centuries of experience and experiments in the teaching of our common law lie behind us. There is the mediaeval system inaugurated by the Inns of Court; there is the university system inaugurated by Blackstone; there is your own system, which, to a large extent, combines the advantages of the systems pursued by the Inns of Court in the Middle Ages, and the university system; there is our system which divides legal education between the universities on the one hand, and the two bodies responsible for the training of those desiring to enter one of the two

branches of the legal profession—the Council of Legal Education and the Law Society. An occasion like this seems to be a fitting one to take stock of our position in this matter of legal education, to take a glance backward at the road by which we have traveled, to consider what we have accomplished, and to estimate what we may yet hope to accomplish.

I propose to take as my starting point the end of the seventeenth century; and I have called this Address "A New Discourse on the Study of the Laws," because it was at the end of that century that Roger North, the brother of Lord Keeper Guildford, wrote a short tract which he entitled "A Discourse on the Study of the Laws." [2] His tract gives us a valuable account of the state of legal education at that time. And, as North's account of the state of legal education applies both to England and America during the greater part of the eighteenth century, it helps us to understand what a long way we have travelled since he wrote.

Roger North was a born biographer—as the lives of his two eminent brothers and his own autobiography testify. He had an amazing eye for picturesque detail, a talent for appropriate anecdote, and, when he

[2] This tract was not published till 1824; there is no direct evidence as to when North wrote it, but it is clear that it was written many years before his death in 1734; in what is probably the last letter he ever wrote, in which he gives advice to a student of the law, he refers to it, but says "where it is I cannot tell," *Lives of the Norths* (Jessopp's Ed.) iii 279.

was not blinded by political prejudice or family affection, a capacity for shrewd common-sense criticism. Moreover, his opportunities for the employment of these talents were unique; for he had lived for many years at the center of the legal and political world. His *Discourse* was written at a time when legal education had touched its lowest point. The Inns of Court, from the fourteenth century onwards, had monopolized the teaching of English law. They had, as Maitland has said, "evolved a scheme of legal education: an academic scheme of the mediaeval sort, oral and disputatious";[3] and in that school of law the greatest lawyers of the day had, from age to age, given public lectures. How good those lectures were we are only just beginning to appreciate; for, with the exception of a large fragment of Bacon's *Reading on the Statute of Uses,* there was, until the publication in 1924 of Miss Putnam's edition of Marowe's Reading *De Pace,* no adequate printed version of any of these lectures.[4] It was because the ground was so fully occupied by the Inns of Court that, till Blackstone started his pre-Vinerian lectures in 1753, English law had never been taught at the Universities. But, for a combination of reasons which I have analyzed elsewhere,[5] the Inns of

[3] *English Law and the Renaissance,* 26-27.

[4] *Oxford Studies in Social and Legal History* vol. vii; for the Readings extant in print see Holdsworth, *H.E.L.* v. 393-5. If more readings of the excellence of Marowe's could be discovered and printed by the Selden Society, they would afford the best of all commentaries on the Year Books and the early Reports.

[5] *H.E.L.* vi 481-493.

Court ceased to teach law in the last quarter of the seventeenth century. That meant that all organized teaching of English law came to an end. North describes the position in the opening sentences of his *Discourse:*[6] "Of all the professions in the world, that pretend to booklearning, none is so destitute of institution as that of the common law. Academick studies, which take in that of civil law, have tutors and professors to aid them, and the students are entertained in colleges, under a discipline, in the midst of societies, that are or should be devoted to study, which encourages, as well as demonstrates such methods, in general, as every one may easily apply to his own particular use. But for the Common Law, however, there are Societies, which have the outward show, or pretence of collegiate institution; yet in reality, nothing of that sort is now to be found in them; and, whereas, in more ancient times, there were exercises used in the Hall, they were more for probation than institution; now even those are shrunk into mere form, and that preserved only for conformity to rules, that gentlemen by tale of appearances in exercises, rather than any sort of performances, might be entitled to be called to the Bar. But none of these called Masters, and distinguished as Benchers, with the power of ordering, and disposing all the common affairs of the Society, ever pretended to take upon them the direction of the students, either to put them, or lead them in any way, but each is left to himself to

[6] At pp. 1-2.

enter at which end he fancies, or as accident, inquiry, or conversation prompts."

The result was that the law student was left to his own resources; and North's *Discourse* is intended to give him some advice as to how to study the law. He gives the student advice as to the books which he ought to read; as to common-placing, that is the construction of an alphabetical abridgment of the law, which was an old and well tried method of acquiring legal knowledge;[7] as to the attendance on the courts and the reporting of cases heard there; as to the discussion of legal cases by the students themselves. These were the only ways in which a student could acquire a knowledge of the law in the eighteenth century, both in England and America. In America the difficulty was, as Mr. Warren has shown,[8] aggravated by the scarcity of law books; and in both countries there was, till Blackstone published his *Commentaries,* no good book of Institutes. The primary book was still Littleton, with Coke's *Commentary*—a commentary which was not at all suitable, as North justly says,[9] to be put into the hands of a beginner. There was no book

[7] As to this see *L.Q.R.* xxxix. 30-32.

[8] *History of the American Bar* 169-173.

[9] "It is the confusion of a student, and thus breeds more disorder in his brains than any other book can, that is not a mere index and abridgement; for this *Commentary* so called, is only a common place book exhausted, and the titles disposed, after the alphabetical order, into that as may follow the text of Littleton, and bating the small application to the text, more often impertinent than otherwise," Discourse 22; see also *ibid.* 11.

of Institutes—no book "the office whereof was," to use Bacon's words, "to be a key and a general preparation to the reading of the course." [10]

The evil consequences of this state of things were obvious. Good students were discouraged; [11] and what was more fatal, many began to say that a liberal education in law was impossible. Blackstone testifies to the fact that in his day many advised the "dropping of all liberal education as of no use to students in the law"; and that many maintained that the only way to teach students law was to place them "at the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical parts of business." [12] And this pernicious idea lasted longer in England than in America. Dicey in 1883, in his Inaugural Lecture

[10] "For the institutions I know well there be books of introductions (wherewith students begin) of good worth, especially Littleton and Fitzherbert; *Natura Brevium;* but they are no ways of the nature of an *Institutions;* the office whereof is to be a key and general preparation to the reading of the course," A Proposition touching the Compiling and Amendment of the Laws of England, Spedding's, *Letters and Life* vi. 70.

[11] Mr. Justice Story write in 1798, "I confess my heart sunk within me. . . . Then the student, after reading that most elegant of all commentaries, Mr. Justice Blackstone's work, was hurried at once into the intricate, crabbed, and obsolete learning of *Coke on Littleton.* . . . I took it up, and after trying it day after day with very little success I sat myself down and wept bitterly," cited Warren, *History of the American Bar* 175-6; however, Story being an exceptional man "went on and on and began at last to see daylight," *ibid.* 176; but it is easy to conjecture the effect upon less able students.

[12] *Comm.* i. 32.

as Vinerian Professor of English law,[13] said, "if the question whether English law can be taught at the Universities could be submitted in the form of a case to a body of eminent counsel, there is no doubt whatever as to what would be their answer. They would reply with unanimity and without hesitation that English law must be learned and cannot be taught, and that the only places where it can be learned are the law courts and chambers."

This was not North's view. He held strongly that a liberal education was needed to make a really learned lawyer. A lawyer, he thought, should know something of history [14] and of Roman law; [15] and, he says,[16] "I have known Music, Geometry, and Natural Philosophy, as well as the knowledge of Geography, States and Republics, in great perfection, harboured *in eodem subjecto* with the body of the Common Law, and consistent with as great practice and preferments as have been known in the profession. . . . Of this the great Bacon was an instance, and surely it is a vast advantage to

[13] At p. 1.

[14] English history, he says, is an "incident necessary to the study of the law: for it often lays open the reasons and occasions that have been for changes that have befallen the Common Law, either by authority of Parliament, or of the Judges in Westminster Hall," *Discourse* 8.

[15] Of the knowledge of Roman law he said, "a man of the law would not be willing to stand mute to the question, what is the difference between the Civil and the Common Law; what is the Imperial Law, what the Canon, what the Pandects, Codes etc." *ibid.* 8-9.

[16] *Ibid.* 9.

be not only a common lawyer, but a general scholar, as in latter times Selden was; for that you call a mere lawyer, seldom reaches better preferment than to be a puisne judge, if at all to be ever invited from his chamber." And he had a just appreciation of the necessary place which legal history plays in the education of a lawyer; for it was in this tract that he wrote the words which I have printed on the title page of my history—"to say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and without it a lawyer cannot be accounted learned in the laws." [17]

But, even if the Inns of Court had reformed their system of legal education, instead of abolishing it, I doubt whether they would have at all approached this ideal. No doubt some of the lawyers, who had been educated at the Inns of Court when they were a teaching university, were more than mere lawyers.[18] But it was not from the Inns of Court that they got their learning. The Inns were, as Coke said, a university "for the profession of one human science only." [19] It

[17] *Discourse* 40.

[18] Mr. Justice Dodderidge, in his book entitled, *The English Lawyer*, maintained at p. 33 that "the profession of our law hath now and formerly had great numbers of students that have had as long and as ample institution in those sciences called liberall as any of them;" for Dodderidge and his books see Holdsworth, *H.E.L.* v. 15, 17, 345, 391-2, 394, 397-8.

[19] "The most famous Universitie for profession of law only, or of any one human Science that is in the world," 3 Co. Rep. Pref.

was not till English law began to be taught in universities, to be taught, that is, in institutions which gave instruction in more than one human science, that legal education was broadened in its scope. The truth which had been preached by Mr. Justice Dodderidge in the early part of the seventeenth century, that "the study of the Lawes must of necessity stretch out her hand and crave to be holpen and assisted by all other sciences," [20] was not generally recognized till the universities began to teach English law.

As we might expect, Blackstone emphasized this aspect of legal education in his inaugural lecture. "Sciences," he said,[21] "are of a sociable disposition, and flourish best in the neighbourhood of each other." In the plan which he sketched, he proposed to investigate the origins of the rules and principles of English law in Celtic and Germanic customs, in Roman law, and in a feudal society; and then, he says, these rules and principles "should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and resolutions observed, and it should be shown how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom." [22] It was because Blackstone was more than a mere

[20] Dodderidge, *The English Lawyer* 35.
[21] *Comm.* i. 33.
[22] *Ibid.* i. 35-6.

lawyer that he had acquired both the knowledge and the literary ability which were needed to produce the first good institutional book on English law that it had ever possessed. It was for that reason that his book was at once accepted, both in England and America, as the book for which students and lawyers had been looking so long. Lord Mansfield, at the time of the publication of the *Commentaries* (1767-9), was asked what books he could recommend to a student who was reading for the bar. He replied "till of late I could never with any satisfaction to myself answer such a question; but since the publication of Mr. Blackstone's *Commentaries* I can never be at a loss." [23] Professor Hammond, whose work won the praise of Sir Henry Maine,[24] tells us, in his edition of the *Commentaries,* that twenty-five hundred copies had been sold before the Declaration of Independence, and that the book "exercised an influence on the jurisprudence of the new nation which no other work has since enjoyed." [25] Mr. Warren, in his *History of the American Bar,* remarks upon the broadening of the scope of legal studies after 1780, "The young lawyer was expected to know something of the general principles of public law, and to approach jurisprudence in a spirit of scientific enquiry. He was taught general views in addition to particular rules"; and Mr. Warren is inclined to

[23] J. Holliday, *Life of Mansfield* 89-90.

[24] *Early Law and Custom* 365.

[25] *Hammond's Edition of Blackstone* ix, cited by Thayer, *Harv. Law Rev.* ix. 170-171.

think that this may be due, partly at any rate, to the influence of Blackstone.[26] But perhaps the best testimony to the success of the *Commentaries* is the fact that old lawyers in practice when the *Commentaries* appeared, complained that he had so clearly explained the principles of the law, that lawyers could now acquire quickly and easily the knowledge which it had cost them many years to collect.[27]

On legal education in America the influence of Blackstone's teaching was felt in two main directions: First, it fostered the idea that English law should be taught at the Universities. As early as 1777 Ezra Stiles, President of Yale, drafted the earliest plan for an American professorship of law.[28] In 1779 a chair of law was founded by Thomas Jefferson at William and Mary College, of which George Wyth was the first holder;[29] and in the previous year Isaac Royall left money to Harvard to found a professorship of law.[30] In 1790 James Wilson was appointed

[26] *History of the American Bar*, 180-181.

[27] "It can hardly be believed at this day, but it is a fact, that many old lawyers, who were in full practice when Blackstone's *Commentaries* first appeared in the country, were frequently heard to regret and complain that he should have so simplified and arranged his subject, and so clearly explained the principles of law, that the same amount of knowledge, which had cost them many years to collect, might be obtained in a short time," Warren, *op. cit.* 224, citing a book written in 1821.

[28] This is printed by Warren in his *History of the American Bar*, 562-6; see *ibid.* 342-3.

[29] *Ibid.* 343-5; A. Z. Reed, *Training for the Public Profession of the Law*, Carnegie Foundation Bulletin 15 pp. 116-117.

[30] *Centennial History of the Harvard Law School* 2.

professor at the University of Pennsylvania.[31] In 1793 Kent was elected professor at King's College Columbia.[32] Secondly, the Commentaries both formally and substantially furnished a model to the teachers of law. Mr. Hammond tells us that in a collection of verbatim notes taken at the Litchfield Law School in 1817 "the references to Blackstone not only outnumber those of any other book, but may be said to outnumber all the rest together." [33]

But as yet it was the time of small beginnings. As Mr. Warren has said, none of the university professors could give "a complete or a practical education for law students." [34] And so private law schools were founded by individual lawyers. The earliest and most famous of these schools was the Litchfield Law School. It was founded by Judge Tapping Reeve in 1784, and it flourished till 1833. It gathered its pupils from many states in the Union, and numbered many distinguished men among its alumni.[35] Like the mediaeval Inns of Court, it both taught the theory of law, and trained students for practice by the conduct of actions and argument of moot cases.[36] It is

[31] Warren, *op. cit.* 346-349.

[32] *Ibid.* 349; A. Z. Reed, *op. cit.* 120-121.

[33] Edition of Blackstone x *note*, cited by Thayer, *Harv. Law Rev.* ix. 171.

[34] *Op. cit.* 357.

[35] A. Z. Reed, *Training for the Public Profession of the Law*, Carnegie Foundation, Bulletin 15 pp. 45, 128-132; Warren, *op. cit.* 357-61; for other similar schools see A. Z. Reed, *op. cit.* 132-3, and Warren, *op. cit.* 364.

[36] *Ibid.* 360-61.

curious to note that, historically, it was private schools of law of this kind which in England in the fourteenth century, developed into the Inns of Court;[37] so that it is possible that, if, in America, these schools had ousted the universities, and had assumed control of legal education, there might have been a similar development in this country.

This was not to be. It was the universities which ousted these private schools. The influence of these schools was only indirect; and it consisted mainly in the fact that teachers trained at these private schools had some share in creating the law schools both of Harvard and Yale.[38] Harvard Law School was established in 1817.[39] Its numbers were at first small; but the foundation of the Dane Chair in 1830, and the appointment of Joseph Story as professor, soon made it the leading law school of the country, and an example to other universities.[40] Law was there taught, as Greenleaf said, as a science; and he pointed out, as Blackstone had pointed out before him, that, consequently, "law was mastered with a facility and readiness, and in a spirit of sound philosophy to which a student in his private clerkship is almost totally a stranger."[41]

Thus in America was established an academic sys-

[37] Holdsworth, *H.E.L.* (3rd Ed.) ii. 495-8.

[38] A. Z. Reed, *Training for the Public Profession of the Law*, Carnegie Foundation, Bulletin 15, pp. 45, 140-141.

[39] See A. Z. Reed, *op. cit.* 137-140.

[40] Warren, *History of the American Bar* 362-5; A. Z. Reed, *op. cit.* 142-150.

[41] *Centennial History of the Harvard Law School* 14.

tem of law teaching on the lines foreshadowed by Blackstone; and it was established very much sooner than in England. As James Bradley Thayer said in 1895, "We transplanted an English root, and nurtured and developed it, while at home it was suffered to languish and die down." [42] In England "the conservatism of a powerful profession—untrained in the learned or scientific study of the law, and unconscious of the need of such training, did not yield to or much consider the suggestion of what had been already done at Oxford. The old method of office apprenticeship was not broken up." [43] And even in America the acceptance of the new system of academic training in a law school was not universal. Judge Bradley Winslow, in a paper which he contributed in 1919 to the *Wigmore Celebration Essays,* tells us that in the middle west, forty-five years ago, the great mass of lawyers "still relied upon the old fashioned method of reading law in a law office." [44] But at the present day, both in England and America there is no doubt that opinion has come round to the view that, as Mr. Justice Holmes has expressed it, "the place for a young man to study law is a law school, not a lawyer's office." [45] The revolutionary view, first preached by Blackstone, that the universities should possess law schools, is now an accepted commonplace.

[42] The Teaching of English Law at Universities, *Harv. Law Rev.* ix. 170.

[43] *Ibid.* 171-2.

[44] *Op. cit.* 113.

[45] *Collected Legal Papers* 154-155.

I think that the conversion of the legal profession in both countries to the true faith, is largely due to the change in the method of legal education which Langdell introduced at Harvard. I think that the introduction of the case system, either as the sole method of legal education, or as an important, perhaps the most important, part of legal education, is its effective cause.

A purely academic system of legal education is apt to degenerate into a lifeless process of taking down and learning dictated lectures, and of memorizing text books. The student thus loses contact with the actual cases upon which the lectures and text books depend, and never learns the most essential part of the lawyer's art—the power to extricate from the facts the real issue of the case in hand, and the power to apply the reasoning of the decisions to solve the issue so raised. As Ames has truly pointed out, the system of office training, with all its defects, did give some sort of a training of that kind;[46] and it was for that reason that lawyers of the old school long maintained that law could only be learned properly in an office. So long as the training in a law school was confined to lectures and recitations there was something to be said for this view. The introduction of the case system into university teaching, by depriving it of its last remnant of truth, enormously increased the strength of the argument for the university teaching of law. It is true that the case system was at first received with

[46] *Lectures on Legal History* 363.

the hostility with which an original idea is usually greeted.[47] But it triumphed partly by reason of its intrinsic reasonableness, and partly by the manner in which it was developed by Ames. "Langdell," it has been truly said, "is entitled to the great honour of a discoverer; but Ames put the discovery to practical use." [48]

In fact the case system is largely a return to the system pursued by the Inns of Court in the Middle Ages and the sixteenth century. And, just as this system in the Middle Ages led to the emphasis placed by the Inns on the practice of mooting, so today its introduction has had the same effect. No doubt mooting was practised before the case system was introduced; but it is obvious that that system is calculated to encourage and extend it. Both in the Middle Ages and today, therefore, the case system has given life and reality to the study of the law, and, as Ames has said,[49] "a spirit of enthusiasm" which no other system of legal education has the power to infuse into the students.

But the case system, as thus revised, is not merely a return to the mediaeval educational system of the Inns of Court. There is this difference: the case system is applied in a university in which law is taught as a science, and in connection with other cognate

[47] *Ibid.* 479; cp. Warren, *History of the American Bar* 550-551, 556.

[48] Memoir of Ames, prefixed to his *Lectures on Legal History* 9.

[49] *Lectures on Legal History* 363.

subjects. The cases are studied and reasoned upon, not, as in the period of the Year Books, under the supervision of lawyers who know little else than cases and law books, but under the supervision of professors who know something of history, jurisprudence, and comparative law. "We must not forget," it is very truly said in the *Centennial History of the Harvard Law School*," [50] "that properly trained teachers with the right spirit may make courses in contracts or torts or conflict of laws or constitutional law do the work of courses in philosophy of law, comparative law, and jurisprudence; may make a course in criminal law and procedure effective as an introduction to criminology; and may make a course in the law of public service companies an effective introduction to administrative law." Thus the merits of three systems of legal education—the old system of the Inns of Court, the system of teaching law by training in an office, and the academic training in a university—have been happily combined; and a system of legal education at once theoretical and practical has been devised.

The effect of the introduction of this system has been felt in all countries in which Anglo-American law is taught. Of course its application varies in different universities and in different countries. I do not presume to say anything about its application here—you all know far more about that than I do. But I can speak from personal knowledge of its great and beneficial effect in my own University of Oxford. In

[50] At pp. 169-170.

1893, when I first began to read law, it was quite exceptional for a tutor to possess a copy of the Law Reports; I don't think many regularly read them; and there was no such thing as a moot club. Now most of the tutors have a set of the Law Reports, and regularly read them; and nearly every college has its moot club. The study of cases, and the argument of cases, have been added to the study of text books, and to the study of such subjects as Roman law, jurisprudence, and legal history. In the Inns of Court the system of lectures still holds its own; but all the Inns now have active moot clubs. The Gray's Inn Moot was revived in 1875 and still flourishes. Its Moot Book, lately published with an introduction by Lord Justice Atkin, shows that it has had a distinguished history; and, as the Lord Justice says, "it serves as a record of an attempt in a small corner of the legal world to uphold the tradition of sound learning in English law."

Of the beneficent influence which schools of law, teaching after this fashion, have had and may have, not only upon their own students and teachers, but also upon the national life, much has been said both here and in England. I think that we may say that that influence is exerted, first on the legal profession; secondly on all who, as members of Legislatures, or otherwise, take part in the government of their country; and thirdly on the doctrines of the law.

First, I think that history proves that efficient law schools make for a high standard of professional honor. Our one great judicial scandal, as Maitland calls it,

occurred in Edward I's reign, before a regular system of legal education at the Inns of Court had been established.[51] Its establishment raised the tone of the legal profession even in the fifteenth century, when public morality was deteriorating. At the end of the sixteenth century Coke could say:[52] "Cast thine eye upon the sages of the law that have been before thee, and never shalt thou find any that hath excelled in the knowledge of these laws but hath plucked from the breasts of that divine knowledge, honesty, gravity, and integrity. . . . For hitherto I never saw any man of a loose and lawless life attain to any sound and perfect knowledge of the said laws; and on the other side I never saw any man of excellent judgment in those laws, but was withal honest, fruitful and virtuous." Law schools effect this result because they put and keep before the minds of their students that sense of the sanctity of the law, and of its great civilizing mission, which is and always has been present to the minds of the great administrators of the law. Mr. Justice Holmes, at the close of his Dedication Address at this University in 1902, said of the teaching of your Dean that "it will send men forth with a pennon as well as with a sword, to keep before their eyes in the long battle the little flutter that means ideals, honour, yes, even romance, in all the dull details."[53]

[51] For this episode see *State Trials of the reign of Edward I* (Royal Hist. Soc.); Holdsworth, *History of English Law* (3rd Ed.) ii 295-299.

[52] 2 Co. Rep. Pref. x-xi.

[53] *Collected Legal Papers* 278.

Secondly, the influence of efficient law schools is exerted on all who, as members of Legislatures or otherwise, take part in the government of their country. Of this influence I said something in an address which I gave to the Society of Public Teachers of Law in 1924, and I should like to repeat substantially what I then said.[54] In the eighteenth century, Blackstone emphasized the need for some knowledge of the law for all those who were called upon to take part in any capacity in the government of the country. He pointed out that this knowledge is more especially needed by those who aspire to be legislators. "Indeed," he said,[55] "it is perfectly amazing that there should be no other state of life, no other occupation, art or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any." It is even more amazing now than it was in the age to which Blackstone spoke. Blackstone's age was not an age of far-reaching legislative reforms—Fearne could spent a quarter of a century upon a work upon contingent remainders, and be pretty certain that no violent legislative changes would intervene to upset the slow and logical evolution of the law. In our own age, when all manner of proposals for far-reaching legislative changes are mooted every day, some sort of education in at least the elements of law, is necessary both for legislators and for their constituents. And it must be

[54] *Journal of the Society of Public Teachers of Law,* 1925, 10-11.
[55] *Comm.* i 9.

the sort of education which only the university teaching of law can give; for the world is smaller than it was when Blackstone wrote, and foreign ideas and theories inspire many demands for new legislative experiments. If, as Burke once said, it is the duty of Parliament "to follow not to force the public inclination; to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community," that general sense must be sufficiently educated to recognize the absurd. Cranks, faddists, and worse abound everywhere; but the places where they chiefly congregate are political meetings and legislative assemblies. It is the lawyers' business to see through their fallacies; and the lawyers' acquaintance with the hard facts of concrete cases, and the effects of legislative experiments old and new, make them admirable critics of the schemes of dabblers in social sciences who have had no legal training. Sometimes, says Hale—and his analysis is as true now as it was when he wrote—sometimes these would-be reformers are inspired by a personal grievance; sometimes they think the law foolish merely because they do not understand it—"and upon this account they will become Solons, and frame a law that they themselves may know and approve because they make it, and, as the Israelites in the wilderness, they would have Gods that they may see"; sometimes they press some new expedient which they have invented without any consideration of the resulting inconveniences. Lawyers can do yeoman service in exposing legislative proposals which rest on these or the like

bases. They can supply a ballast of experience in the world of fact, a critical faculty, and a spirit of compromise which is not afraid to be illogical. They can thus perform the priceless service of helping to create in the community a general sense which is common sense.

Thirdly, law schools can exert an influence equally great upon the doctrines of the law. This they are able to do, not only by the training which they give to their students, but more especially by the books upon all branches of law, and matters cognate thereto, which are written by professors to whom these schools have given the opportunity of a life devoted to legal research. Both Ames [56] and Dicey [57] have emphasized the fact that the advent of this professorial class has raised the standard of legal literature; and a comparison between the state of legal literature before the advent of such a class, and its condition today, proves that Ames and Dicey are right. To deal adequately with the long list of distinguished professors who have made your legal literature what it is today would require many lectures. Some day perhaps one of your professors will produce a great book upon the literature of American law. Here I can only mention very summarily one or two great names who are as well known to us as they are to you. Story and Kent—judges as well as professors and authors—did for your law all and more than all that Blackstone did for ours. Story, Ames

[56] *Lectures on Legal History* 365.

[57] Blackstone's Commentaries, *National Review* liv 669-674.

tells us, "in the sixteen years of his professorship, being also all those years on the bench of the Supreme Court, wrote ten treatises of fourteen volumes, and thirteen reviews of these treatises." [58] Kent's *Commentaries,* Dicey said, alone rival those of Blackstone.[59] In more recent times there is John Chipman Gray's great work on Perpetuities, which shares with Story's books the honor of constant citation both by the bar and bench in England. Langdell and Ames are perhaps more famous as great teachers than as great authors; but both have written books which are known wherever Anglo-American law is studied; and there is no doubt that Ames could, if he had chosen, written a great history of English law—that, at any rate, is an opinion to which Maitland would have subscribed.[60] If we consider the great work which he did for the Harvard Law School, we cannot but wonder at the extent, the range, and the quality of his published writings on important aspects of legal history, and on other branches of the law. James Bradley Thayer's *Preliminary Treatise on the Law of Evidence* is perhaps the best illustration of the way in which the application of history to a special branch of the law can elucidate its principles. He was the first to see that the great characteristic features of our law of evidence were the products of the jury system. His

[58] *Lectures on Legal History* 365.

[59] Blackstone's Commentaries, *National Review* liv 668.

[60] See the most interesting series of letters between Maitland and Ames which are printed in Cambridge *Law Journal* ii 4-18.

book contains the first adequate history of the jury that had ever been written, and an illuminating account of the relation of trial by jury to the older methods of trial. All this historical matter is made to illustrate and explain his acute analysis of the principles of the law of evidence. It is no wonder that the treatise was described, when it first appeared, as "a book which goes to the root of the subject more thoroughly than any other text book in existence." [61]

I have been speaking of men whose tasks of making your legal history have been accomplished. To speak of the many able lawyers who are now making it is impossible—my own ignorance and the limitations of time forbid. But to all rules there are exceptions; and to this rule I intend to make two exceptions. As these two exceptions are two of your greatest lawyers, I think you will admit that they are valid exceptions. They are Mr. Justice Holmes and your own Dean, Dean Wigmore.

Mr. Justice Holmes's book on the Common Law is as well known to all our law schools and lawyers as it is on this side of the Atlantic. We do not, it is true, know so well as you his long series of judgments on all branches of your law; but we know enough of these to admire that combination of legal learning, statesmanship, and literary quality, which is the mark of a mastery of the law to which few lawyers have ever attained in the course of its long history. I personally owe much to him for the encouragement which

[61] Cited by Ames, *Lectures on Legal History* 464.

he has given to my work; and I rejoice to think that it fell to my lot to present him for the degree of Hon. D.C.L. which the University of Oxford conferred upon him in 1909. I said of him then that he was the judge of a court, which, more nearly than any other tribunal in the world, realized Coke's ideal of the supremacy of the law. I think that it would be equally true to say that just as Coke by his decisions and his writings helped English law through the difficult transition from mediaeval to modern, so Mr. Justice Holmes, by his decisions, is helping to adjust your law to modern conditions. Of him more truly than of any other judge it may be said that he has always acted on the advice given by Bacon to judges in his *Essay on Judicature* —"Judges ought, above all, to remember the conclusion of the Roman Twelve Tables, *Salus populi suprema lex;* and to know that laws, except they be in order to that end, are things but captious, and oracles not well inspired." He more than any other judge has acted on another principle stated by Bacon in the same essay: "Let no man weakly conceive that just laws and true policy have any antipathy; for they are like the spirits and sinews, that one moves with the other."

I feel that I am a bold man in attempting to say anything of Dean Wigmore in his presence and in his own university. But I venture to justify myself in two ways. In the first place, I have a conclusive precedent of the very highest authority on my side. Mr. Justice Holmes did precisely the same thing at the close of his address at the dedication of your law

school building on October 20th, 1902. In the second place, Bacon, thinking that his work was of that enduring kind which could not be rightly estimated by his contemporaries, left his reputation to foreign nations and the next ages. Now, as we cannot wait for the judgment of the next ages, we are I think entitled to elect to take the other option; so that, as I belong to a foreign nation, I think that I am entitled to speak.

But, having proved my title to speak, I am somewhat at a loss where to begin—so ample and so various are Dean Wigmore's literary and other activities. His suggestion, in the *Journal of the Society of Public Teachers of Law* for 1926, of using pictures to help in the teaching of comparative law, is attractive, and, I think admits of development. I have often thought that such matters as the various applications of the *per aes et libram* ceremony, the *legis actio sacramento,* trial by battle, or a common recovery, would make excellent films. Indeed I am not at all sure that the cinema is not destined to become an inseparable adjunct to the case system. But, great as he is as a teacher, his greatest achievement is his literary work. All students of English law, of comparative law, of legal history, and of jurisprudence, are his debtors for the part which he has taken in making knowledge accessible by the production of the *Continental Legal History Series,* the *Modern Legal Philosophy Series,* and the *Essays in Anglo-American Legal History.* His own Essay, in the last named series, on the History of Responsibility for Tortious Acts, is the most com-

plete account of the history of a branch of the law which cannot be understood unless it is studied historically. But, of course, it is his great book on Evidence which will be his title to enduring fame—a book which, the more it is studied the more its readers marvel that it could have been written by one man. It is exactly the book which Ames envisaged when he was speaking of the way in which law professors could help the judges to administer the law. He said:[62] "From the nature of the case the judge cannot be expected to engage in original historical investigations, nor can he approach the case before him from the point of view of one who has made a minute and comprehensive examination of the branch of the law of which the question to be decided forms a part. The judge is not and ought not to be a specialist. But it is his right, of which he has been too long deprived, to have the benefit of the conclusions of specialists, of professors, whose writings represent years of study and reflection, and are illuminated by the light of history, analysis, and the comparison of the laws of different countries." Judges who are adjudicating difficult points in the law of evidence can no longer complain that they are deprived of their right to the conclusions of a specialist. They have the assistance of a great book—a book which, in Ames' words, represents years of study and reflection, and is illuminated by the light of history, analysis, and the comparison of the laws of different countries.

[62] *Lectures on Legal History* 366-367.

These, then, are the great and beneficent influences which schools of law have exercised, and will continue to exercise, on the legal profession, on Legislatures, and on the law. These magnificent buildings—the gift of Mrs. Rachel Mayer, Elbert H. Gary, and many other donors—are the outward and visible sign that this law school, under the leadership of your famous Dean and his able staff of teachers, has in the past been active in promoting all these great objects; and they are a pledge that it will in the future use its larger opportunities to carry them out even more effectually. From the point of view of chronology, indeed, these buildings are the newest buildings in the world devoted to the teaching of the law; and your law school cannot claim great antiquity. But let us discard chronology, and say with Bacon: *"Antiquitas saeculi juventus mundi.* These times are the ancient times, when the world is ancient, not those which we account ancient *ordine retrogrado,* by a computation backward from ourselves." [63] Your school is, from this point of view, an ancient school—ancient in its experience gained from the lessons of history. At the same time the need for these new buildings shows that it also possesses the expansive vigor of youth; and that, though young in years, it has been rich in achievement. It enters into possession of them, not as a new and untried owner who has lately come into a great estate, but as a successful man of genius who is entering upon a more magnificent mansion better suited to the great position which

[63] Advancement of Learning, *Works* (Spedding's Ed.) iii 291.

he has won by his own efforts. They justify our faith that, in this age of new things and new ideas, the school will continue to hand on to many future generations of students those sound traditions of *"bon droit et raison,"* [64] which have in the past enabled our common law to guide the state safely through many ages of transition, because they have enabled it to unite to the critical discrimination which is characteristic of age, the capacity to welcome and to assimilate new ideas which is characteristic of youth. May the opening of these buildings be but one of many milestones in a long and a successful life of service to legal education, to the practice and theory of the law, and to your country.

[64] [The learned lecturer here quotes the motto—a favorite expression of St. Ives, judge, and patron saint of the legal profession—borne on the seal of the School of Law.—Ed.]

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